Supreme Court, U. S.
FILED
SEP 17 1980
MICHAEL RODAK, JR., CLERK

80-441

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

GULF OIL COMPANY, ET AL.,
Petitioners,

v.

WESLEY P. BERNARD, ET AL.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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Petitioners, Gulf Oil Company and the Oil, Chemical and Atomic Workers International Union, Local No. 4-23, and Oil, Chemical and Atomic Workers International Union, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this action on June 19, 1980.

QUESTIONS FOR REVIEW

1. Whether during the pendency of a class action, a United States district court can constitutionally enter an order limiting certain communications between plaintiffs or their attorneys and potential or actual class members not yet formal parties to the action, in order to prevent actual and potential abuses of the class action device?

2. Whether the court of appeals can refuse to consider the time a charge is pending before the EEOC in applying the doctrine of laches?

3. Whether the court of appeals' decision erroneously allowed the EEOC's two-letter system to abrogate the jurisdictional requirements prescribed by Congress under Title VII?

PARTIES BELOW

The following is a listing of all parties to the proceeding in the court of appeals, as required by Supreme Court Rule 21.1(b):

1. Wesley P. Bernard; Elton Hayes, Sr.; Rodney Tizeno; Hence Brown, Jr.; Willie Whitley and Willie Johnson; plaintiffs.

2. The class of all black employees now employed or formerly employed by defendant, Gulf Oil Company, in Port Arthur, Texas, and all black applicants for employment at Gulf Oil Company who have been rejected for employment at said company.

3. Oil, Chemical and Atomic Workers International Union, Local Union No. 4-23 and Oil, Chemical and Atomic Workers International Union, defendants.

4. International Association of Machinists and Aerospace Workers, Port Arthur Lodge No. 823; International Association of Machinists and Aerospace Workers; International Brotherhood of Electrical Workers, Local Union No. 390; International Brotherhood of Electrical Workers, AFL-CIO; United Transportation Local Union; International United Transportation Union; Bricklayers, Masons, and Plasterers International Union, Local 13; and International Bricklayers, Masons, and Plasterers Union: prospective defendants named in plaintiffs' motion to join additional defendants and for leave to amend the complaint. This motion was pending when the district court granted summary judgment for the existing defendants.

5. Gulf Oil Corporation, Defendant-Appellee; Affiliates of Gulf Oil Corporation are as follows:

Afran Bahamas Limited; Afran Transport Company; J-Jin Chemical Company, Ltd.; American Heavy Lift Shipping Company; Andogas S.A.; Argentine Gulf Oil Company; Australian Gulf Oil Company; Bahamas Gulf Oil Company; Belgulf Tankers N.V.; Bio Research Center Company, Limited; Blackships, Inc.; Bolivian Gulf Oil Company; Brazilian Gulf Oil Company; Britama Tankers Limited; Bulk Petroleum Corporation; Burgan Pension Fund Trustees Limited; Cabinda Gulf Oil Company; Caribbean Gulf Refining Corporation; China Gulf Oil Company Limited; China Gulf Plastics Corporation; Chinhae Chemical Company, Ltd.; Colombian Gulf Oil Company; Colonial Pipeline Company; Compania Ecuatoriana Texaco y Gulf, S.A.; Compania Maritima Rio Gulf S.A.; Compania Petrolera Aguarico, S.A.; Coral Gulf Oil Company; County Airport Corporation; Dansk Olia-Import A/S; Det Gronlandske Olieaktieselskab; Dixie Pipeline Company; Eastern Gulf Oil Company Limited; Eastern Venezuela Gas Transport Company; Ecuadorian Gulf Oil Company; Explorer Pipeline Company; Four Corners Pipe Line Company; The "400" Oil Co., (A Division of Bulk Petroleum Corporation); Frisia Minerallolien B.V.

The Gaelic Oil Company Limited,; Global Energy Operations and Management Company-International (A Division of Transocean Gulf Oil Company); Global Energy Operations and Management Company, Ltd.; Global Energy Operations and Management Company-U.S. (A Division of Gulf Oil Corporation); Grand Bay Co.; Gulf Agricultural Chemicals Company Limited; Gulf Asian Investments Company Limited; Gulf Asian Services (A Division of Gulf Asian Investments Company Limited); Gulf Benzin A/S; Gulf Chemicals International, Inc.; Gulf Computer Sciences Incorporated; Gulf Consumer Services Company (A Division of Gulf Oil Corporation); Gulf del Peru, S.A.; Gulf Ecuatoriana de Petroleo, S.A.;

Gulf Energy and Minerals Company (A Division of Gulf Oil Corporation); Gulf Energy and Minerals Company-International (A Division of Gulf Oil Corporation); Gulf Energy and Minerals Company-U.S. (A Division of Gulf Oil Corporation); Gulf Europe Company; Gulf-Gas (Norway) A/S; Gulf-Gas (Sweden) Aktiebolag; Gulf International Company; Gulf International Trading Company (A Division of Gulf Oil Corporation); Gulf International Trading Company (A Division of Gulf Oil Trading Company, Limited).

Gulf International Trading-Far East (A Division of Gulf Asian Investments Company Limited); Gulf Italia Production Company S.p.A.; Gulf Italiana S.p.A.; Gulf Kuwait Company; Gulf Management Institute (A Division of Gulf Oil Corporation); Gulf Marine and Services Company Limited; Gulf Marine Management Company (A Division of Afran Transport Company); Gulf Merchandising Company (A Division of Bulk Petroleum Corporation); Gulf Mineral Resources Co. (A Division of Gulf Oil Corporation); Gulf Minerals Canada Limited; Gulf Oil (Antilles) Inc.; Gulf Oil (Belgium) S.A.; Gulf Oil Canada Limited; Gulf Oil Chemicals Company (A Division of Gulf Oil Corporation); Gulf Oil Chemicals Company Asia, Limited; Gulf Oil Communications Company, Inc.; Gulf Oil Company-Asia; Gulf Oil Company-Eastern Hemisphere; Gulf Oil Company (Hong Kong) Inc.; Gulf Oil Company-International (A Division of Gulf Oil Corporation); Gulf Oil Company-Japan (A Division of Gulf Oil Corporation); Gulf Oil Company-Korea (A Division of Gulf Oil Corporation); Gulf Oil Company-Latin America (A Division of Gulf Oil Corporation); Gulf Oil Company (Nigeria) Limited; Gulf Oil Company of Gabon; Gulf Oil Company (Portugal) Limitada; Gulf Oil Company-South Asia.

Gulf Oil Company-Thailand (A Division of Gulf Oil Corporation); Gulf Oil Company-U.S. (A Division of Gulf Oil Corporation); Gulf Oil European Company;

Gulf Oil Financial Corporation; Gulf Oil Foundation of Delaware; Gulf Oil Germany, Inc.; Gulf Oil (Great Britain) Limited; Gulf Oil (Luxembourg) S.A.; Gulf Oil Marine Agency N.V.; Gulf Oil Middle East Trading Company (A Division of Gulf Oil Trading Company, Limited); Gulf Oil (Nederland) B.V.; Gulf Oil Northern Development Company (A Division of Gulf Minerals Canada Limited); Gulf Oil Production Company; Gulf Oil Raffinaderij B.V.; Gulf Oil Real Estate Development Company; Gulf Oil Refining A/S; Gulf Oil Refining Limited; Gulf Oil Sales, Inc.; Gulf Oil Securities Company, Inc.; Gulf Oil Services, Inc.; Gulf Oil (Switzerland); Gulf Oil Terminals (Ireland) Limited; Gulf Oil Trading Company (A Division of Transocean Gulf Oil Company); Gulf Oil Trading (Far East) (A Division of Gulf Asian Investments Company Limited); Gulf Oil Trading Investments Limited; Gulf Oil Zaire S.A.R.L.; Gulf Overseas Trading, Inc.; Gulf Petroleum S.A.

Gulf Refining and Marketing Company (A Division of Gulf Oil Corporation); Gulf Refining Company; Gulf Research & Development Company; Gulf Research Racing Company; Gulf Reston, Inc.; Gulf Reston Properties, Inc.; Gulf Science and Technology Company (A Division of Gulf Oil Corporation); Gulf Supply and Distribution Company Limited; Gulf Technology Europe B.V.; Gulf Tire & Supply Company; Gulf Trading and Transportation (A Division of Transocean Gulf Oil Company); Gulf Trading and Transportation Company (A Division of Gulf Oil Corporation); Gulf Transport Company Aktiebolag; Gulf Travel Club, Inc.; Gulf (U.K.) Offshore Investments Limited; Hagstrom & Knape Oljeaktiebolag; Hutchison-Hayes International, Inc.; Hydrant Servicing Company Limited; Iberian Gulf Oil Company; Indonesia Gulf Oil Company (A Division of Gulf Oil Corporation); Industrial Asphalt (A Division of Gulf Oil Corporation); Insco Limited; Iranian Oil Participants Limited; Iranian Oil Services (Holdings) Limited; Java Gulf Limited; Keydril Company; Keydril Limited; Keydril U.S.A. (A Division of Gulf Oil Corporation).

Key International Drilling Company Limited; Korea Gulf Oil Company; Korea Lubricants Company, Ltd.; Korea Oil Corporation; Kupan Emirates Company Limited; Kupan Financial Company (Rotterdam) B.V.; Kupan International Company; Kuwait Oil Company Limited; Kuwait Oil Company Trustees Limited; Laurel Pipe Line Company; Lost Hills Water Company; Mainline Pipelines Limited; Mene Grande Oil Company; Michigan Stations (A Division of Bulk Petroleum Corporation); Michigan Stations-Personnel Services (A Division of Bulk Petroleum Corporation); Midcaribbean Investments Limited; Mozambique Gulf Oil Company; National Butane Company; Nedgulf Tankers B.V.; A/S Nordisk Flaskegas; A/S Nordisk Flaskegas Holding Co.; Nordisk Gulf-Gas A/S; Norsk Gulf A/S; Northeast Stations & Services, Inc.; Norwegian Gulf Oil Production Company; Okan Pipeline Company; Okinawa Sekiyu Seisei Company, Ltd.; B. V. Olie Handelsvereeniging (Oil Trading Association); Pacific Gulf Oil Limited; Pennsylvania Oljeimport Aktiebolag; Petroleo Gulf do Brasil Limitada.

Petroleos Gulf de Guatemala, S.A.; Petroleos Gulf del Ecuador C.A.; Petroleum Products Storage and Transport Company S.A.; Petrosil Oil Company Limited, The Pittsburg & Midway Coal Mining Company, Productos Latinoamericanos, S.A.; Propet Company, Limited; Refineria de Petroleos del Norte S.A. (Petronor); SARNI, S.p.A.; Shawinigan Products Corporation; Sociedad Anonima Espanola de Lubrificantes (SAFL); SOLVO Finance and Investment Corporation Ltd.; South Pacific Gulf Oil Company; Spanish Gulf Oil Company; Spencer Quimica Mexicana, S.A. de C.V.; Sunrise International Company, Limited; Svenska Aktiebolaget Alfred Olsen & Co.; Svenska Gulf Oil AB; Taiwan VCM Industries Corporation; Transocean Chemicals Company; Transocean Chemicals Company (Hong Kong) Limited; Transocean Gulf Oil Company; Transport Oil Company-Madison (A Division of Bulk Petroleum Corporation); Transport Oil Company-Milwaukee (A Division of Bulk Petroleum Corporation);

United Petroleum Securities Corporation; Venezuela Gulf Refining Company; Venture Acceptance Corporation; Venture Out in America, Inc.; Veritas Oil Company Aktiebolag; Warren Petroleum Company (A Division of Gulf Oil Corporation); West Texas Gulf Pipeline Company; and Zaire Gulf Oil Company.

WM. G. DUCK
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OPINIONS BELOW

The opinion of the court of appeals, sitting *en banc,* is reported at 619 F.2d 459 and appears in Appendix A. The order of the court of appeals granting a rehearing *en banc,* is reported at 604 F.2d 449, and appears in Appendix B. The vacated panel opinion of the court of appeals, of which parts I, II, and III are adopted by the *en banc* opinion, is reported at 596 F.2d 1249 and

appears in Appendix C. The first order of the district court limiting communications is unreported, but appears in Appendix D, while the second order limiting communications appears in Appendix E. The order of the district court denying Plaintiffs' motion to communicate with members of the proposed class appears in Appendix L. The order of the district court granting Defendant's motion for summary judgment appears in Appendix F.

JURISDICTION

The judgment of the court of appeals, following a rehearing *en banc* was entered on June 19, 1980. This petition for a writ of certiorari was filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS STATUTES, AND FEDERAL RULES INVOLVED

UNITED STATES CONSTITUTION

Amendment I

> Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

UNITED STATES CODE

§ 1981. Equal rights under the law

> All persons within the jurisdiction of the United States shall have the same right in every state and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citi-

zens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981 (1976)

§ 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000(e)(2)(a) (1976)

(c) Labor organization practices

It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any indi-

vidual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

42 U.S.C. § 2000(e)(2)(c) (1976)

FEDERAL RULES

Rule 23(d) Orders in Conduct of Actions

In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

Fed. R. Civ. P. 23(d)

STATEMENT OF THE CASE

I. Background and Proceedings Before the District Court

Respondents are six present or retired black employees of Gulf's Port Arthur, Texas Refinery. On May 18, 1976, Respondents filed a purported class action suit in federal district court alleging that Gulf engaged in policies, practices, customs and usages made unlawful by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and the Civil Rights Act of 1866, 42 U.S.C. § 1981. Such acts allegedly constituted racial discrimination against Respondents and the class they sought to represent which consists of all black employees employed by Gulf in Port Arthur, Texas; all blacks formerly employed in Port Arthur by Gulf; and all black applicants for employment at Gulf who had been rejected for employment (this group had no temporal or geographic limits).

Three of the Respondents, Bernard, Brown and Johnson, filed charges of discrimination with the Equal Employment Opportunity Commission (EEOC) in 1967 against Gulf and the Local Union, for which the EEOC found reasonable cause on August 15, 1967. Later Respondent Bernard attempted to file an amended charge in 1976 against the International Union, but this charge was dismissed by the EEOC as untimely. Respondent Whitley filed a charge with the EEOC in 1972 against Gulf, for which the EEOC issued a determination in 1973 that there was no reasonable cause. The EEOC issued Whitley a "notice of right to sue" letter on the same day. (App. G.) Respondent Hayes and Tizeno, at the time suit was filed, had not filed any charges with the EEOC against Gulf or the unions. (App. H.) On February 26,

1975 Respondents Bernard, Brown and Johnson each received a letter from the EEOC stating that Gulf and the Local Union did not wish to entertain conciliation discussions (App. I.) and, in essence, stated no further action was contemplated by the Commission.[1]

On April 11, 1976 Respondents Brown and Bernard received notice of right to sue letters. (App. J.) The EEOC has never issued a right to sue letter to Respondent Johnson. (App. K.) This suit was filed on May 18, 1976, within 90 days after Respondents Brown and Bernard received the right to sue letters; but was not filed within 90 days after they received the EEOC's failure of conciliation letter.

At the same time the individual charges of discrimination were pending conciliation discussions between Gulf, the EEOC and the Office for Equal Opportunity, Department of the Interior (OEO), were being conducted pursuant to a Commissioner's charge issued by the EEOC in 1968. The negotiations between Gulf, the EEOC, and the OEO relating to the Commissioner's charge took place over a period of several years. A Conciliation Agreement based on the Commissioner's charge was reached on April 14, 1976, providing an award of over $900,000 to 614 present and former black employees and 29 female employees at Gulf's Port Arthur Refinery. Neither Gulf nor the Unions conducted conciliation discussions on the individual charges.

As soon as the Conciliation Agreement was finalized, Gulf, pursuant to the terms of the Conciliation Agree-

1. On March 2, 1976, the EEOC national office conveyed its decision of February 2, 1976 not to sue to its District Director in Houston. (See *amicus curiae* brief *en banc* of EEOC.)

ment, mailed a letter and release, the form of which was approved by the federal agencies, notifying all employees covered by the Conciliation Agreement that they were entitled to an award of back pay and that upon execution of the receipt and general release the employees would receive the back pay award. At the time this action was filed approximately 431 black employees out of a total of 614 employees entitled to a back pay award had executed the receipt and general release and had received their back pay checks.

On May 22, 1976, five days after the instant action was filed, attorneys for Respondents attended a meeting of 75 actual or potential class members and discussed with them the issues involved in the case and recommended to those employees that they not sign the receipt and general release which had been mailed to them pursuant to the Conciliation Agreement. In fact, it was reported to Gulf by an individual attending the meeting that an attorney for Respondents advised this group that they should mail back to Gulf the checks they had received since they could recover at least double the amount which was paid to them under the Conciliation Agreement by prosecuting the present lawsuit.

Without putting at issue the circumstances surrounding the meeting and in an effort to safeguard against the potential for abuse of the class action process, Gulf sought an order to limit communications between potential class members and all parties and their counsel to this lawsuit. This order was entered on May 28, 1976 by District Judge Steger, ruling in Chief Judge Fisher's absence without formal objection by Respondents. (App. D.) At the

same time, Gulf voluntarily ceased to issue back pay awards and collect releases.

Upon motion by Gulf, and after extensive briefing accompanied by affidavits and a hearing, the order limiting communications was subsequently modified by Judge Fisher on June 22, 1976, to permit Gulf to proceed in accordance with the Conciliation Agreement. (App. E.) The language of the order was changed to permit constitutionally protected communications while limiting only those communications that had the purpose of solicitation and that tended to misrepresent the status, purposes and effects of the cause of action and that impeded the orderly administration of justice. The modified order was copied almost verbatim from "Suggested Local Rule No. 7—Prevention of Potential Abuses of Class Actions" contained in the *Manual for Complex Litigation,* 1, (Pt. 2) J. Moore *Federal Practice,* Pt. II, § 1.41 (1979).

On July 6, 1976, Respondents and their attorneys moved for permission to communicate with members of the proposed class tendering to the court the substance of the communication in the form of a pamphlet or "handout." Permission was denied as Respondents' communication tended to misrepresent the status, purposes and effects of the cause of action. (App. L.)

Thereafter, Respondents filed a Motion to Amend the Complaint which was granted on July 19, 1976. Gulf filed a Motion to Dismiss the Amended Complaint, in which the Local and the International Unions joined. No formal discovery by way of depositions, interrogatories or requests for admissions had been undertaken by either party and there had been no class certification hearing.

Gulf moved to dismiss on the following grounds: (1) Respondents had failed to meet the jurisdictional prerequisites for maintaining the action; (2) the action was barred by the statute of limitations; (3) the action was barred by laches; and (4) the Complaint failed to name a proper class representative. Gulf submitted numerous affidavits in support of the motion, including that of Mr. C. B. Draper, a Gulf employee, which stated several important witnesses had died and many relevant documents had been destroyed. (App. N.) Oral arguments were heard on this Motion on September 24, 1976.

On November 29, 1976, the court on its own motion ordered that the Motion to Dismiss the Complaint be treated as a Motion for Summary Judgment and gave each side until January 3, 1977 to submit any other relevant material. (App. M.) On January 11, 1977 the court granted Summary Judgment in favor of Gulf (App. F.)

In this order, the court held that since neither Respondents Hayes nor Tizeno had filed a Complaint with the EEOC, they could not maintain suit in their own right or adequately represent a class. As to Respondents Bernard, Johnson and Brown, the court held that since more than 90 days had elapsed between the receipt of the notice issued by the EEOC under § 706(f) of the Act and the filing of this lawsuit, their Title VII claims were time barred. Respondent Whitley's complaint was dismissed as time barred since he had not filed suit within 90 days of either the EEOC's first notice or right to sue notice.

Furthermore, the court held that Respondents § 1981 claim was barred by the applicable two-year statute of

limitations since nine years had elapsed before suit was filed. The court found no circumstances of continuous discrimination. Finally, the court found a compelling argument for the application of the equitable doctrine of laches in this particular case.

II. Proceedings Before the Court of Appeals

Respondents appealed to the United States Court of Appeals for the Fifth Circuit, and on June 15, 1979 that court reversed and remanded the case to the district court. 596 F.2d 1249 (5th Cir. 1979). (App. C.) The Fifth Circuit concluded that Gulf had not met its summary judgment burden of establishing the absence of any material issue of fact and held that neither the statute of limitations nor the equitable doctrine of laches barred Plaintiff's claims. The court did, however, declare that the order limiting the parties' communications with members of the putative class was a permissible exercise of the district court's discretionary power to control a class action under Rule 23(d) of the Federal Rules of Civil Procedure. After motion duly made by all parties, the court of appeals subsequently granted a petition for a rehearing *en banc*. 604 F.2d 449 (5th Cir. 1979).

On June 19, 1980, the court of appeals issued its *en banc* decision in the instant case. 619 F.2d 459 (5th Cir. 1980). (App. A.) The court affirmed the panel's reversal of the district court's grant of summary judgment and remanded the case to the district court. Furthermore, the Fifth Circuit sitting *en banc* vacated the order of the district court limiting communications.

REASONS FOR GRANTING THE WRIT

This Petition raises substantial and important questions concerning the administration of class actions in the federal courts and the power of district courts to prevent actual and potential abuses of the class action device under Rule 23(d) of the Federal Rules of Civil Procedure. The issues raised in the instant case have not yet been passed upon by this Court. In this case, the Fifth Circuit invalidated a district court's order which provided for court supervision of communications with potential members of an alleged class. The order was entered after extensive briefing and a hearing where allegations were made of actual abuses of the class action device. As the district court's order was based directly upon the proposed order recommended by the *Manual for Complex Litigation*,[1] the Fifth Circuit's opinion is in conflict with the distinguished Board of Editors of the Federal Judicial Center. Moreover, as the *Manual's* suggested rule and order has been adopted by numerous district courts across the nation, the Fifth Circuit's decision has implications and importance which reach far beyond the facts of the instant case. Furthermore, the language of the Fifth Circuit's opinion is in conflict with a decision of the United States Court of Appeals for the Second Circuit in *Weight Watchers of Philadelphia, Inc. v. Weight Watchers Intl. Inc.*, 455 F.2d 770 (2d Cir. 1972).

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1. Federal Judicial Center, *Manual for Complex Litigation*, reprinted in 1 (pt. 2) J. Moore, *Federal Practice, Manual for Complex Litigation* Pt. II, § 1.41 (1979).

I. THE DECISION OF THE COURT OF APPEALS CONSTITUTES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

The order limiting communications was entered after it was demonstrated to the district court's satisfaction that the interest of actual and potential class members, not yet parties to the suit, were threatened by reported abuses of the class action procedure. The substance of the Order, which the court of appeals ordered vacated, was taken almost verbatim from that suggested in the *Manual for Complex Litigation*.[2] Although the provisions of the *Manual* are not obligatory upon the district courts, they represent "a collection of procedures which are 'recommended,' because, as a product of experience in the development of able minds, they are deemed worthy of consideration by all. . . . The *Manual* is a collection of suggested procedures for the handling of complex cases written by judges for judges after receiving the widest possible range of suggestions and criticisms from the Bench and Bar."[3] The Fifth Circuit's invalidation of an order suggested by the eminent panel of legal scholars of the Federal Judicial Center warrants the attention of this Court. As this Court exercises a supervisory authority over the federal courts, it is urged that the Court should clarify the conflict between the Federal Judicial Center's approach to prevention of class action abuses and the Fifth Circuit's opinion in the instant case.

Since the local rule suggested by the *Manual* has been adopted in numerous districts, *see, e.g.*, S.D. Fla. R. 19;

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2. *Manual, supra* at § 1.41.

3. *Id.* at XXVI (1977 ed.).

N.D. Ga. R. 221.2, 3; N.D. Ill. R. 22; D. Md. R. 20; M.D. N.C R 17(b)(6); S.D. Ohio R. 3.9.4; S.D. Tex. R. 6; W.D. Wash. R. 23(g), and since individual orders have also been entered independently of local rules of the suggestion of the *Manual, see, e.g., N.O.W. v. Minnesota Mining & Manufacturing Co.*, [1977] 18 Lab. Rel. Rep. (BNA) (Fair Empl. Prac. Cas.) 1176, 1179, the Fifth Circuit's decision is in conflict with a broad spectrum of the judiciary.[4] The Fifth Circuit's condemnation of the *Manual's* model rule and order for the prevention of class action abuses contrasts sharply with federal practice in other circuits, as evidenced by the fact that the *Manual's* model rule has been adopted in certain district courts of the Third, Fourth, Sixth, Seventh, and Ninth Circuits listed above. The Fifth Circuit's decision in the instant case also conflicts with a district court order issued in the Eighth Circuit which was patterned after the *Manual's* suggested order. *N.O.W. v. Minnesota Mining & Manufacturing Co., supra.*

In addition, the court of appeals below has rendered a decision in conflict with the decision of the United States Court of Appeals for the Second Circuit which considered whether district courts had power to regulate communications of parties involved in class action litigation. In *Weight Watchers of Philadelphia, Inc. v. Weight Watchers Intl. Inc., supra,* the Second Circuit refused to issue a writ of mandamus requiring a district court to vacate an order similar to the order in controversy in the instant

4. On the basis of its *en banc* decision in *Bernard,* the Fifth Circuit invalidated Local Rule 17 of the United States District Court for the Northern District of Florida which limited communications in class actions. *See In Re Lilla Ann Norton,* 622 F.2d 917 (5th Cir. 1980). Thus the Fifth Circuit seems to draw no distinction between local court rules and orders limiting communications.

case. The district court in *Weight Watchers* had entered an order in the form suggested by the then current edition of the *Manual for Complex Litigation,* prohibiting the formal parties from communicating with nonparty class members without court approval. The district court subsequently modified the order by allowing limited communications in the form of contract negotiating sessions initiated and requested only by the non-formal party class members.

Even though the order issued by the district court in the *Weight Watchers* case was more restrictive than the order entered by the district court in the instant case, the Second Circuit, in refusing to issue a writ of mandamus, held that the order "was well within the wide range of discretion in the management of class actions necessarily accorded the district judge by F. R. Civ. P. 23(d)." *Weight Watchers, supra* at 775. This conclusion by the Second Circuit Court of Appeals is particularly noteworthy in that the order at issue in the *Weight Watchers* case did not include the provision permitting communication without court approval when the formal parties or their attorneys had a good-faith belief that such communication was protected by the First Amendment. As the order involved in the instant case included a provision which specifically permitted protected speech without prior approval, the order was much less constitutionally onerous than the order upheld by the Second Circuit's refusal to issue the writ of mandamus in the *Weight Watchers'* decision. Therefore, the Fifth Circuit's conclusion that the protective order suggested by the *Manual for Complex Litigation* is unconstitutional as a prior restraint is in direct conflict with the Second Cir-

cuit's finding that implementation of the *Manual's* suggested order is well within the discretionary power of federal district courts.

The sharply divergent views on the *Manual's* suggested order between the Second Circuit and Fifth Circuit warrant this Court's grant of review of the Fifth Circuit decision. The fact that a nationwide sampling of federal district court rules demonstrates an acceptance of the Second Circuit's views on the soundness of the *Manual's* suggestion presents an even more compelling reason that this Court should address the controversy.

II. THE DECISION OF THE COURT OF APPEALS RELATING TO LACHES IS IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEAL

The court of appeals below has rendered a decision in conflict with the decision of the United States Court of Appeals for the Ninth Circuit in the case of *Lynn v. Western Gillette, Inc.*, 564 F.2d 1282 (9th Cir. 1977). In *Lynn*, the Ninth Circuit held that it would be proper for the district court to take the plaintiff's lack of diligence into account in determining the amount of back pay, if any, to be awarded the plaintiff should he prevail on the merits. *Id.* at 1288. Specifically, the court held: "The complainant should not be permitted to prejudice the employer by taking advantage of the Commission's slowness in processing claims or by procrastinating while being aware that the Commission intends to take no further action." *Id.* at 1287.

Recently, the Ninth Circuit held that laches may be used as a complete defense to a Title VII claim brought by a private litigant. *Boone v. Mechanical Specialties Co.*,

609 F.2d 956 (9th Cir. 1979). In *Boone,* the court of appeals affirmed the opinion of the district court which found that Boone's delay in bringing suit was unreasonable. Boone failed to request a Notice of Right to Sue until seven years after he filed a complaint with the EEOC. the court of appeals concluded that they could not read Title VII as providing "for the indefinite tolling of a claim which knowingly lies dormant with the EEOC, to the prejudice of the adversary party." *Id.* at 960.[5]

The present decision is also in conflict with the decision of the Seventh Circuit in *Kamberos v. GTE Automatic Electric, Inc.,* 603 F.2d 598 (7th Cir. 1979). In *Kamberos,* the court of appeals held the time for which back pay was to be computed should be reduced by an amount of time equivalent to the time between the expiration of the 180-day period, after which the plaintiff could have requested a notice of right to sue and the date when the right to sue letter was actually received by the plaintiff. The basis for the Seventh Circuit's decision was that the plaintiff had permitted her charge to lie dormant with the EEOC for over four years despite the fact that EEOC regulations provide for the automatic issuance of a notice of right to sue any time 180 days after filing of the charge with the EEOC. *See* 42 U.S.C. § 2000e-5(f)(1).[6]

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5. The court distinguished *Boone, supra* at 916 n.2, from the decision of the Fifth Circuit in *Bernard,* by suggesting that in *Bernard* there were continuing administrative proceedings up until suit was filed, whereas in *Boone* the court concluded the claim lay dormant for several years. This distinction is inaccurate since the affidavit of Herbert C. McClees, District Director of the EEOC, (App. O) shows that the only EEOC activity in the present case related to the Commissioner's charge and not the individual charges.

6. Once the request is made, EEOC must issue the notice promptly. 29 C.F.R. § 1601.28(a) (1979).

This Court has recognized defenses based upon inexcusable delay which prejudice the rights of adverse parties. Speaking for the Court in *Albermarle Paper Co. v. Moody,* 422 U.S. 405, 424 (1975), Mr. Justice Stewart made it clear that a private plaintiff in a Title VII action may be barred from asserting a claim for back pay on behalf of class members if his conduct was prejudicial to the other party. Later, in *Occidental Life Insurance Co. of California v. Equal Employment Opportunity Commission,* 432 U.S. 355, 373 (1977), Mr. Justice Stewart stated that the EEOC may be barred from filing a suit if it delayed inexcusably and the defendant was materially prejudiced by the delay.

In the instant case there was a nine-year delay between the date Respondents filed their EEOC charge and the date they filed this suit—one of the longest delays in any reported case. The record was clear below that this delay caused severe prejudice to Gulf's ability to defend this case since many key witnesses had died or retired, the management of the plant had changed at least three times and numerous documents had been destroyed during Gulf's normal record retention process. *See* affidavit of C. B. Draper (App. N.).

In its opinion the Fifth Circuit, in essence, held laches can never apply when a Title VII litigant chooses to delay his private remedy and elects to leave his charge pending before the EEOC—no matter how long that process may take.[7] This opinion is in direct conflict with decisions of

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7. "A plaintiff cannot be penalized for choosing to forego this (private remedy) alternative and electing instead the legislatively and judicially favored method of relying on the administrative processes of the EEOC. We therefore hold that plaintiffs' failure to file

the Seventh and Ninth Circuits and pronouncements of this Court. Therefore, a writ of certiorari should be granted to resolve this conflict.

III. THE COURT OF APPEALS' DECISION ERRONEOUSLY ALLOWS THE EEOC'S TWO-LETTER SYSTEM TO ABROGATE THE JURISDICTIONAL REQUIREMENTS PRESCRIBED BY CONGRESS UNDER TITLE VII

Based upon its decision in *Zambuto v. American Telephone and Telegraph Co.*, 544 F.2d 1333 (5th Cir. 1977), the court of appeals held that the limitations period under Title VII within which a charging party must file suit does not begin to run until the EEOC has notified the charging party of both the failure of conciliation and the EEOC's decision not to sue; thus, clearly indicating that the administrative process has been completed. *See also Page v. U. S. Industries Inc.*, 556 F.2d 346 (5th Cir. 1977), *cert. denied*, 434 U.S. 1045, (1978). Although *Zambuto* clearly held that the EEOC improperly extended the jurisdictional time limitations for a charging party to file suit,[8] it also applied equitable principles to extend these jurisdictional time limits where a charging party alleged he had been misled by the two-letter system. By applying *Zambuto* to the instant case, the court below has abrogated the clear jurisdictional

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their Title VII claim until completion of the EEOC process was not inexcusable delay and could not support the application of laches." *Bernard*, 596 F.2d at 1257.

8. "To the extent that EEOC has adopted the practice which places the commencement of this 90-day period within the claimant's power by bifurcating the statutory notice, it is an invalid procedure which is counter to the plain language of the statute and to the congressional purpose undergirding it." *Zambuto, supra* at 1335.

requirements under Title VII and by doing so is in conflict with decisions of the Supreme Court.[9]

When Congress enacted Title VII it set forth jurisdictional time periods a charging party must follow in order to invoke the jurisdiction of the federal courts. At the time this suit was filed, a charging party was required to file a cause of action in federal court within 90 days of notice that the EEOC's administrative process had been completed. *See* 42 U.S.C. § 2000e-5(f)(1) (1976). In this case, it is undisputed that no respondent filed suit within 90 days of the EEOC's first letter.

As early as 1974, this Court in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), held that the time limitations under Title VII were jurisdictional. In *Alexander*, the court stated "it [Title VII] does, however, vest federal courts with plenary powers to enforce the statutory requirements; and it specifies with precision the jurisdictional prerequisites that an individual must satisfy before he is entitled to institute a lawsuit." *Id.* at 47.

This Court in *Intl. Union of Electrical, Radio and Machine Workers AFL-CIO, Local 790 v. Robbins and Myers, Inc.*, 429 U.S. 229 (1976) refused to invoke equitable principles to extend the jurisdictional time

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9. *Zambuto* is in harmony with other circuit court opinions, *see, e.g., Lacy v. Chrysler Corporation*, 533 F.2d 353 (8th Cir. 1976) (*en banc*), *cert. denied*, 429 U.S. 959 (1976); *Tuft v. McDonnell Douglas Corp.*, 517 F.2d 1301 (8th Cir. 1975) *cert. denied*, 423 U.S. 1052 (1976); *Weaver v. Joseph Schlitz Brewing Co.*, 551 F.2d 122 (6th Cir. 1977); *McGuire v. Aluminum Company of America*, 542 F.2d 43 (7th Cir. 1976); *Williams v. Southern Union Gas Co.*, 529 F.2d 483 (10th Cir.), *cert. denied*, 429 U.S. 959 (1976); *Garner v. E. I. du Pont de Nemours and Co.*, 538 F.2d 611 (4th Cir. 1976); *DeMatteis v. Eastman Kodak Co.*, 511 F.2d 306, *modified*, 520 F.2d 409 (2d Cir. 1975).

limitations under Title VII. In this case, a plaintiff had followed the grievance procedure under a collective bargaining agreement prior to filing a charge of discrimination with the EEOC. Upon completion of the grievance procedure and well after the expiration of the 90-day filing period under Title VII, the plaintiff filed his discrimination charge with the EEOC. The Supreme Court rejected plaintiff's equitable arguments holding that Title VII's jurisdictional prerequisites were designed "with precision" citing *Alexander* and emphasizing that "Congress did not leave to courts the decision as to which delays might or might not be 'slight.' " *Electrical Workers, supra* at 240.

Again, in *United Airlines Inc. v. Evans,* 431 U.S. 553 (1977), this Court failed to allow an extension of the jurisdictional time limitations under Title VII where petitioners argued present effects of past discrimination are continuing in nature. In rejecting the petitioner's equitable argument that the jurisdictional time limits should be extended, the court ruled suit had to be filed within 90 days of the act of discrimination.

Once the circuit court below found the two-letter system invalid, as it did in *Zambuto,* decisions of this Court mandate rejection of equitable arguments to extend Title VII's jurisdictional time limits past receipt by the Respondents of EEOC's first letter. Since no Respondent timely filed suit within 90 days of the EEOC's first letter, the district court properly dismissed Respondents' action.

CONCLUSION

For the reasons stated above, it is respectfully prayed that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX A

En Banc Opinion of the United States Court of Appeals for the Fifth Circuit, Dated June 19, 1980.

Wesley P. BERNARD et al.,
Plaintiffs-Appellants,

v.

GULF OIL COMPANY et al.,
Defendants-Appellees.

No. 77-1502.

United States Court of Appeals,
Fifth Circuit.

June 19, 1980.

* * *

Appeal from the United States District Court for the Eastern District of Texas.

Before COLEMAN, Chief Judge, BROWN, GODBOLD, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE, KRAVITCH, FRANK M. JOHNSON, Jr., GARZA, HENDERSON, REAVLEY, POLITZ, HATCHETT, ANDERSON, RANDALL, TATE, SAM D. JOHNSON and THOMAS A. CLARK, Circuit Judges.*

GODBOLD, Circuit Judge:

This suit was brought as a class action by six present or retired black employees of the Port Arthur, Texas, plant of Gulf Oil Company, under Title VII of the Civil Rights

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* Judges Goldberg, Ainsworth and Charles Clark did not participate in the consideration or decision of this case.

Act of 1964 (42 U.S.C. § 2000e-2) and 42 U.S.C. § 1981. The members of the asserted class are black employees and black former employees of the Port Arthur plant, and black applicants rejected for employment with Gulf Oil (at the Port Arthur plant and elsewhere). The defendants are Gulf Oil and the Oil, Chemical and Atomic Workers' Union.

Plaintiffs charged that Gulf discriminated against blacks in hiring, job assignments, pay scales, discipline and discharge, employed discriminatory tests and racially tainted promotion and progression practices, and denied training to blacks and refused seniority to blacks. They alleged that the union had agreed to, acquiesced in or condoned Gulf's discriminatory practices. The district court dismissed the Title VII claim as untimely filed, granted summary judgment for defendants on the § 1981 claim, and applied laches as an additional ground for its disposition of both claims. With respect to these three holdings, we adopt parts I, II and III of the panel opinion[1] and reverse and remand to the district court. A fourth issue we will consider at length. It concerns the validity of an order of the district court restricting communications by named plaintiffs and their counsel with actual and potential class members not formal parties to the suit. By a divided vote the panel found the order valid. 596 F.2d at 1258. We hold that the order violated the First Amendment to the Constitution and Rule 23, Fed.R.Civ.P.

I. *The background*

The facts are accurately stated in the dissenting opinion to the panel decision, 596 F.2d at 1262-76, and the court

1. *Bernard v. Gulf Oil Co.*, 596 F.2d 1249, *vacated*, 604 F.2d 449 (5th Cir. 1979).

adopts that statement. We restate the facts in condensed form.

In April 1976, Gulf and EEOC entered into an extra-judicial conciliation agreement covering alleged racial discrimination against blacks at the Port Arthur plant and providing for conciliation of alleged discriminatory practices and for back pay to 614 present and former black employees. No employees were parties to the agreement. Plaintiffs brought this suit in May 1976, represented by local counsel in association with New York attorneys from the NAACP Legal Defense and Education Fund. Before answering and before a class was certified, Gulf filed an unsworn request that the court enter an order limiting communication by parties and their counsel with actual or potential class members. Gulf asserted that it had received reports that one of plaintiffs' attorneys had attended a meeting of actual and potential class members and had advised the group not to sign receipts and releases sent to them pursuant to the conciliation agreement because he could recover twice as much for them in the suit just filed.

District Judge Steger entered a temporary order on May 28.[2] Gulf filed an additional unsworn charge that the same plaintiffs' attorney had also recommended that employees who had already signed receipts and releases should return their checks. Gulf also filed an affidavit from EEOC which stated that the issues in the suit were almost identical to those embraced in the conciliation agreement.

Plaintiffs challenged the constitutionality of the temporary order. They filed affidavits denying Gulf's charges

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2. It is substantially the same as ¶ 2 of the modified order. *See* n. 4 *infra*.

and a brief asserting that numerous issues in the suit were not within the matters conciliated. On June 22, without proof of the unsworn charges made by Gulf and without entering findings of fact, Chief District Judge Fisher rejected plaintiffs' constitutional arguments and entered a modified order explicitly modeled on that suggested in the *Manual for Complex Litigation,* Part II, § 1.41 (1973 ed.),[3] a publication widely used by federal judges. It is the validity of this modified order that is now before us.

On July 6 plaintiffs moved for permission for themselves and their counsel to communicate with members of the proposed class and also asked for guidance from the court. They attached a notice, reproduced at 596 F.2d 1266, which they proposed to distribute and asserted that they were constitutionally entitled to distribute. The notice alerted black employees to the existence of the lawsuit as an alternative to acceptance of Gulf's conciliation offer and urged them to talk to an attorney. The time for acceptance of Gulf's conciliation offer expired on or about August 8. On August 10, the court, without explanation, denied plaintiffs' motion by a one-sentence order.

II. *The provisions of the order*

The order, described by plaintiffs as a "gag order," is broad in scope and plenary in nature, forbidding a wide range of communications.[4]

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3. The form of the suggested order is the same in the 1977 edition of the *Manual.*

The 1977 edition also appears at 1 Pt. 2 Moore's Federal Practice, Part II, ¶ 1.41, at 226-28 (2d ed. 1979) and Wright & Miller, *Manual for Complex Litigation,* Part II, § 141 at 188-89 (1977).

4. The order, as modified, provided:

IT IS ORDERED:

(1) That Gulf's motion to modify Judge Steger's Order dated May 28, 1976 is granted:

The persons enjoined are "all parties hereto and their counsel."

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(2) That Judge Steger's Order dated May 28, 1976 be modified so as to read as follows:

In this action, all parties hereto and their counsel are forbidden directly or indirectly, orally or in writing, to communicate concerning such action with any potential or actual class member not a formal party to the action without the consent and approval of the proposed communication and proposed addressees by order of this Court. Any such proposed communication shall be presented to this Court in writing with a designation of or description of all addressees and with a motion and proposed order for prior approval by this Court of the proposed communication. The communications forbidden by this order include, but are not limited to, (a) solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action; (c) solicitation by formal parties to the class action of requests by class members to opt out in class actions under subparagraph (b)(3) of Rule 23, F.R.Civ.P.; and (d) communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the class action, and of any actual or potential Court orders therein which may create impressions tending, without cause, to reflect adversely on any party, any counsel, this Court, or the administration of justice. The obligations and prohibitions of this order are not exclusive. All other ethical, legal and equitable obligations are unaffected by this order.

This order does not forbid (1) communications between an attorney and his client or a prospective client, who has on the initiative of the client or prospective client consulted with, employed or proposed to employ the attorney, or (2) communications occurring in the regular course of business or in the performance of the duties of a public office or agency (such as the Attorney General) which do not have the effect of soliciting representation by counsel, or misrepresenting the status, purposes or effect of the action and orders therein.

If any party or counsel for a party asserts a constitutional right to communicate with any member of the class without prior restraint and does so communicate pursuant to that asserted right, he shall within five days after such communication file with the Court a copy of such communication, if in writing, or an accurate and substantially complete summary of the communication if oral.

The subject matter forbidden is communications with any actual or potential class member not a formal party,

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(3) That Gulf be allowed to proceed with the payment of back pay awards and the obtaining of receipts and releases from those employees covered by the Conciliation Agreement dated April 14, 1976, between Gulf, the U.S. Equal Employment Opportunity Commission and the Office for Equal Opportunity, U.S. Department of the Interior; That the private settlement of charges that the employer has violated Title VII is to be encouraged, *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1975), *cert denied*, 425 U.S. 944, 96 S.Ct. 1684, 48 L.Ed.2d 187 (1976).

(4) That the Clerk of the Court mail a notice to all employees of Gulf at its Port Arthur Refinery who are covered by the Conciliation Agreement and who have not signed receipts and releases for back pay awards informing them that they have 45 days from the date of the Clerk's notice to accept the offer as provided for by the Conciliation Agreement or such offer will expire until further order of the Court;

(5) That the contents of the notice be the same as that set out in Appendix I;

(6) That Gulf bear the expense of mailing the notice and a copy of the Court's order to the individuals covered by item (4) above;

(7) That all employees who have delivered receipts and releases to Gulf on or before 55 days from the date of the Clerk's notice shall be deemed to have accepted the offer as contained in the Conciliation Agreement;

(8) That any further communication, either direct or indirect, oral or in writing (other than those permitted pursuant to paragraph (2) above) from the named parties, their representatives or counsel to the potential or actual class members not formal parties to this action is forbidden;

(9) That Gulf inform the Court 65 days from the date of the Clerk's notice to be sent by the Clerk of the Court of the names of potential or actual class members who have accepted the offer of back pay and signed receipts and releases pursuant to the Conciliation Agreement and the names of those who have refused or failed to respond.

It is Plaintiff's contention that any such provisions as hereinbefore stated that limit communication with potential class members are constitutionally invalid, citing *Rodgers v. United States Steel Corporation*, 508 F.2d 152 (3rd Cir. 1975), *cert. denied*, 420 U.S. 969, 95 S.Ct. 1386, 43 L.Ed.2d 649 (1975). This Court finds that the *Rodgers* case is inapplicable, and that

"concerning [this] action . . . without the consent and approval of the proposed communication and proposed addressees by order of this Court." More specific communications that the proscription includes, but is not limited to, are: (a) solicitation of legal representation of potential and actual class members not formal parties; (b) solicitation of fees and expenses; (c) solicitation of requests by class members to opt out; and (d) "communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the class action, and of any actual or potential Court orders therein which may create impressions tending, without cause, to reflect adversely on any party, any counsel, this Court, or the administration of justice."

The means of communication forbidden are "directly or indirectly, orally or in writing."

The order contains several exceptions, set out in the second subparagraph of ¶ (2): communications between attorney and client, and between attorney and prospective client when initiated by the prospective client, and communications in the regular course of business.

The third subparagraph of ¶ (2) is a much-debated provision requiring post-communication filing with the court of any communcation asserted to be constitutionally protected:

> If any party or counsel for a party asserts a constitutional right to communicate with any member

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this order comports with the requisites set out in the *Manual for Complex Litigation*, Section 1.41, p. 106 CCH Edition 1973, which specifically exempts constitutionally protected communication when the substance of such communication is filed with the Court.

Bernard v. Gulf Oil Co., supra, 596 F.2d at 1258 n. 9.

> of the class without prior restraint and does so communicate pursuant to that asserted right, he shall within five days after such communication file with the Court a copy of such communication, if in writing, or an accurate and substantially complete summary of the communication if oral.

The order also contains a provision that the clerk of the district court send a notice to those employees covered by the conciliation agreement who have not signed receipts and releases for back pay. The notice, which is an appendix to the order, tells the employee that this case is pending, and briefly describes it, and that he has been identified as an actual or potential class member. It describes the outstanding conciliation offer from Gulf and tells the employee that he has a choice of accepting the Gulf offer or declining it and being considered at a later date for inclusion in the class in the suit. Employees are told they have 45 days in which to accept the conciliation offer.

II. *The basis for the order*

Presumably, since the district court made no findings, its order was based upon suggestions contained in the *Manual,* which recommends that procedures be devised to anticipate and prevent potential abuses in class actions, includng solicitation of representation, solicitation of funds and of opt-out requests, and misrepresentations that may create confusion and reflect adversely on the court or the administration of justice. *Manual,* Part I, § 1.41. The *Manual* recommends that district courts adopt local rules imposing "in every potential and actual class action" substantially the ban on communication that is here involved, and in the absence of a local rule[5] impose the

5. The district court here involved had not adopted a local rule.

ban by an order entered promptly after the filing of any actual or potential class action. *Id.*, Part I, § 1.41; Part II, § 1.41 (Suggested Local Rule 7 and Suggested Pretrial Order No. 15).[6] Our interpretation of the basis for the Court's order is reinforced by the court's rejection of plaintiffs' constitutional arguments on the ground that the order it had entered comported with the requirements of the *Manual.*

We can assume that the district court did not ground its order on a conclusion that the charges of misconduct made by Gulf were true. Nothing in its order indicates that it did, and, if it did, such a conclusion would have been procedurally improper and without evidentiary support. Rather the court appears to have acted upon the rationale of the *Manual* that the court has the power to enter a ban on communications in any actual or potential class action as a prophylactic measure against potential abuses envisioned by the *Manual.*[7]

IV. *The order is a prior restraint*

The order represents a significant restriction on First Amendment rights. Because no other court of appeals

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6. The only significant difference between the suggested local rule and the suggested pretrial order is the wording of the rule's "constitutional right" exception. The suggested rule provides: "Nor does the rule forbid communications protected by a constitutional right." It then imposes the same post-communication filing requirements that the order does. While we here consider the constitutionality of the *Manual's* suggested order, much of our analysis is equally applicable to the suggested local rule. *See* n. 22 *infra*. The semantic change does not alter the thrust of the rule.

7. The panel majority interpreted the district court's action as we do. It treated Gulf's charges as irrelevant and considered that the district court had plenary power in a class action to ban communications by a prophylactic order. 596 F.2d at 1261 n. 14.

has ruled on the constitutionality[8] of the *Manual's* suggested rule and order, and because of the broad impact of

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8. In 1975 the Third Circuit raised the constitutional issue and expressed its doubts about the power of the district court to impose a prior restraint on communication or association in *Rodgers v. U.S. Steel Corp.*, 508 F.2d 152 (3d Cir.), *cert. denied*, 423 U.S. 832, 96 S.Ct. 54, 46 L.Ed.2d 50 (1975) (*Rodgers I*);

> The imposition of such a condition [prior approval] upon access to the Rule 23 procedural device certainly raises serious first amendment issues. *See New Jersey State Lottery Comm'n v. United States*, 491 F.2d 219 (3d Cir.), *cert. granted*, 417 U.S. 907, 94 S.Ct. 2603, 41 L.Ed.2d 211 (1974). There is no question but that important speech and associational rights are involved in this effort by the NAACP Legal Defense and Education Fund, Inc. to communicate with potential black class members on whose behalf they seek to litigate issues of racial discrimination. *See, e. g., United Transportation Union v. State Bar*, 401 U.S. 576, 91 S.Ct. 1076, 28 L.Ed.2d 339 (1971); *NAACP v. Button*, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963). And the interest of the judiciary in the proper administration of justice does not authorize any blanket exception to the first amendment. *See Wood v. Georgia*, 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed.2d 569 (1962); *Craig v. Harney*, 331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed. 1546 (1947); *Pennekamp v. Florida*, 328 U.S. 331, 66 S.Ct. 1029, 90 L.Ed. 1295 (1946); *Bridges v. California*, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192 (1941). Whatever may be the limits of a court's powers in this respect, it seems clear that they diminish in strength as the expressions and associations sought to be controlled move from the courtroom to the outside world. *See* T. Emerson, The System of Freedom of Expression 449 et seq. (1970).
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> [T]he committee which drafted the *Manual* probably went too far in its apparent assumption that *Craig v. Harney, supra,* and *Bridges v. California, supra,* would permit the vesting of unreviewable discretion in a district court to impose a prior restraint on communication or association. 1 J. Moore, *supra*, at 29 n. 28.

508 F.2d at 162-63, 165. However, the Third Circuit elected to proceed on a statutory ground, and no circuit has since directly confronted the constitutional issue.

The Second Circuit, in *Weight Watchers of Philadelphia, Inc. v. Weight Watchers International, Inc.*, 455 F.2d 770 (2d Cir. 1972), rested its refusal to overturn a similar restriction on the unreviewability of discretionary orders by writ of mandamus, and thus did not deal with the constitutionality of the order.

the *Manual's* suggestions,[9] we address the constitutional issues before us.

[1] We hold that the order entered in this case is an unconstitutional prior restraint.

[2] Prior restraints on freedom of speech have long been disfavored in American law. *Near v. Minnesota,* 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931). While a prior restraint is not unconstitutional per se, there is a heavy presumption against its constitutionality. *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 558-59, 95 S.Ct. 1239, 1246, 43 L.Ed.2d 448, 459 (1975); *Organization for a Better Austin v. Keefe,* 402 U.S. 415, 419, 91 S.Ct. 1575, 1577, 29 L.Ed.2d 1, 5 (1971). We discuss in Part VI, below, the circumstances under which a prior restraint may be held lawful.

[3] Prior restraint has traditionally been defined as a "predetermined judicial prohibition restraining specified expression. . . ." *Chicago Council of Lawyers v. Bauer,* 522 F.2d 242, 248 (7th Cir. 1975), *cert. denied,* 427 U.S. 912, 96 S.Ct. 3201, 49 L.Ed.2d 1204 (1976); *see*

The 1977 edition of the *Manual* adhered to the position of the 1973 edition. The 1978 Supplement reviews the division in the authorities concerning the validity of the recommended rule and order, but concludes:

> [T]here should be no modification of the foregoing recommendations or of the sample rule and order based thereon, except when a controlling decision of the court of appeals of the circuit requires it.

Id., Part I, § 1.41, p. 3.

9. The local rule suggested by the *Manual* has been adopted in numerous districts. *See* S.D.Fla.R. 19; N.D.Ga.R. 221.2, 3; N.D.Ill. R. 22; D.Md.R. 20; M.D.N.C.R. 17(b)(6); S.D. Ohio R. 3.9.4; S.D. Tex.R. 6; W.D. Wash. R. 23(g). No doubt many ban orders have also been entered independently of local rules, on the suggestion of the *Manual. See, e.g., NOW v. Minnesota Mining and Manuf. Co.,* 18 FEP Cas. 1177 (D. Minn. 1977).

also Nebraska Press Association v. Stuart, 427 U.S. 539, 559, 96 S.Ct. 2791, 2802, 49 L.Ed.2d 683, 697-98 (1976); *Near v. Minnesota, supra;* Litwack, *The Doctrine of Prior Restraint,* 12 Harv. C. R.—C. L. Rev. 519, 520 (1977). This expansive definition has not often been further elaborated. There are, however, four separate but related features that may serve to distinguish prior restraints from limitations on free speech imposed by subsequent restraints.

[4] 1. *Origin.* A prior restraint is generally judicial rather than legislative in origin, although an enabling statute may authorize the judicial suppression of publication. *Near v. Minnesota, supra.* The essence of prior restraint is that it places specific communications under the personal censorship of the judge. Kalven, *Foreword: Even When a Nation is at War,* 85 Harv. L. Rev. 3, 33 (1971) [hereinafter Kalven].[10]

The district court's order is undeniably judicial in origin.[11]

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10. The classic prior restraint is an administrative licensing scheme adopted pursuant to a statute. The licensor had broad discretion with regard to each publication to be restrained. *See, e.g., Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975); *Penthouse Int'l, Ltd. v. McAuliffe,* 610 F.2d 1353, 1359-61 (5th Cir. 1980). The distinction between this type of scheme and a more general legislative enactment is that the restraint operates only on specific publications, chosen by the administrator. There is thus less room for diversity to exercise its "tendency to break and control the violence of faction." The Federalist No. 10 (Madison). The same danger exists with respect to judicial restrictions on free speech; indeed, most of the more recent prior restraint cases have involved judicial rather than administrative licensing. *See, e.g., Nebraska Press Association v. Stuart, supra; New York Times Co. v. U. S.,* 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971).

11. We need not pass on the validity of the distinction made by the Seventh Circuit in *Chicago Council of Lawyers v. Bauer, supra,* 522 F.2d at 248, between courts as judicial bodies and courts as rule-

2. *Purpose.* It has been suggested that the sole purpose of a prior restraint is suppression rather than punishment. *Southeastern Promotions, Ltd. v. Conrad, supra,* 420 U.S. at 558-59, 95 S.Ct. at 1246, 43 L.Ed.2d at 459; *Near v. Minnesota, supra,* 283 U.S. at 715, 51 S.Ct. at 630, 75 L.Ed. at 1367. Unlike a criminal statute, which by its terms defines the punishment for its violation, a prior restraint "does not deal with punishments; it provides for no punishment, except in case of contempt for violation of the court's order, but for suppression and injunction, that is, for restraint upon publication." *Near, supra,* 283 U.S. at 715, 51 S.Ct. at 631, 75 L.Ed. at 1367. The justification for drawing a distinction based on this difference is that "a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand." *Southeastern Promotions, Ltd. v. Conrad, supra,* 420 U.S. at 559, 95 S.Ct. at 1246, 43 L.Ed.2d at 459; *see also New York Times Co. v. U. S.,* 403 U.S. 713, 733, 91 S.Ct. 2140, 2151, 29 L.Ed.2d 822, 836 (1971) (White J., concurring).

Without question, the purpose of the order is restraint upon publication.

3. *Means of enforcement.* This distinction between prior and subsequent restraints is inextricably linked to the prior restraint's judicial origin and unique purpose. "Punishment by contempt is an important attribute of a 'prior restraint' that distinguishes it from a criminal statute that forbids a certain type of expression." *Chicago Council of Lawyers v. Bauer, supra,* 522 F.2d at 248.

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making or quasi-legislative bodies. However, since the instant order was promulgated in the course of litigation and not as a local rule, it satisfies even that Circuit's definition of a judicial restraint.

The penalty is thus both more swiftly imposed and less subject to the mitigating safeguards of the criminal justice system than is the punishment for violation of a statute. *See Nebraska Press Association v. Stuart, supra,* 427 U.S. at 559, 96 S.Ct. at 2802, 49 L.Ed.2d at 697-98; *U. S. v. Gurney,* 558 F.2d 1202, 1208 (5th Cir. 1977), *cert. denied,* 435 U.S. 968, 98 S.Ct. 1606, 56 L.Ed.2d 59 (1978). This lack of safeguards accentuates the dangers inherent in any suppression of speech. *See Southeastern Promotions, Ltd. v. Conrad, supra,* 420 U.S. at 559, 95 S.Ct. at 1246, 43 L.Ed.2d at 459-60; *In re Halkin,* 598 F.2d 176, 184 n.15 (D.C. Cir. 1979).

The expression restrained in this case is not forbidden by any statute. The text of the order is silent as to means of enforcement,[12] and there are other possible means available,[13] but the appellees accept that the means of enforcement intended is the contempt power of the court, and we agree.[14]

The dangers associated with the penalty of contempt inhere even though other sanctions are to some extent available. Persons subject to the order before us could reasonably conclude that the court's contempt power ex-

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12. The *Manual* is silent also.

13. Possibily the court could penalize a plaintiff attorney who disobeyed the order by removing him as attorney for the class, or deny or withdraw class action status, *Halverson v. Convenient Food Mart, Inc.,* 458 F.2d 927 (7th Cir. 1972); *Korn v. Franchard Corp.,* 456 F.2d 1206 (2d Cir. 1972); *Kronenberg v. Hotel Governor Clinton, Inc.,* 281 F.Supp. 622 (S.D. N.Y. 1968), or remove as class representative a plaintiff who disobeyed. Sanctions such as these would not be available, however, against defendants and their counsel. With respect to them, contempt would seem to be the only available sanction.

14. Contempt here would be criminal because used to punish past misconduct. *In re Timmons,* 607 F.2d 120, 123-24 (5th Cir. 1979).

tended to enforcement of the order, and the conclusion is inescapable that it was exposure to contempt that silenced plaintiffs' attorneys and caused them to ask leave of court to send out the notice to class members.[15]

Moreover, the potential availability of other sanctions cannot serve to reduce the constitutional infirmity of the order. This prong of the test is concerned primarily with the lack of procedural safeguards associated with the enforcement of prior restraints. The fact that contempt is only one of several alternative sanctions does not ameliorate this concern.

[5-7] 4. *Means of constitutional challenge.* While the unconstitutionality of a statute may be raised as a defense to prosecution for its violation, a litigant who disobeys an injunction is precluded from raising its constitutional invalidity as a defense in contempt proceedings. *Compare Shuttlesworth v. Birmingham,* 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969) *with Walker v. Birmingham,* 388 U.S. 307, 87 S.Ct. 1824, 18 L.Ed.2d 1210 (1967); *see U. S. v. Dickinson,* 465 F.2d 496 (5th Cir. 1972), *cert. denied,* 414 U.S. 979, 94 S.Ct. 270, 38 L.Ed.2d 223 (1973) (applying rule against collateral attack to judicial restriction on publication); *cf. In re Timmons,* 607 F.2d 120, 124-25 (5th Cir. 1979) (similar distinction between civil and criminal contempt). Thus, a prior restraint may be distinguished from a statute prohibiting publication in that the former has "an immediate and irreversible sanction. If it can be said that a threat of criminal or civil

15. One who may be willing to violate a statute, and thus risk criminal penalties, may be less willing to act in direct defiance of an injunction or court order and thus subject himself to the court's potential contempt power. *See In re Halkins, supra,* 598 F.2d at 184 n.15; *Rodgers I, supra,* 508 F.2d at 161; Kalven, *supra,* 85 Harv. L.Rev. at 34 & n. 156; Note, 88 Harv. L. Rev. 1911, 1922 (1975).

sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time." *Nebraska Press Association v. Stuart, supra,* 427 U.S. at 559, 96 S.Ct. at 2803, 49 L.Ed.2d at 698. As one commentator has eloquently observed: "Prior restraints fall on speech with a brutality and a finality all their own. Even if they are ultimately lifted they cause irremediable loss—a loss in the immediacy, the impact, of speech." A. Bickel, The Morality of Consent 61 (1975), *quoted in Nebraska Press Association v. Stuart, supra,* 427 U.S. at 609, 96 S.Ct. at 2826, 49 L.Ed.2d at 727 (Brennan, J., concurring).

The impact of the present order was direct and immediate. It silenced the named plaintiffs and their attorneys during the period that Gulf's conciliation offers were outstanding and putative class members were considering whether to accept. A named plaintiff, question by the black employee working next to him concerning the suit or the relative advantages of conciliation award and suit, could not reply. The order cut off dialogue[16] despite the contentions of plaintiffs' counsel that some of the issues in the suit were not covered by the conciliation agreement to which plaintiffs and putative class members were not parties and that the conciliation benefits to the putative class were inadequate. It stopped investigation and discovery at a time when it is critical, just after suit has been filed.

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16. Exception (2) in the second subparagraph of ¶ (2) permits communication between attorney and client, and between attorney and prospective client if on the initiative of a client or the prospective client. This provision concerning prospective clients is largely illusory; presumably, in a class action, a prospective client (class member) would often learn of the attorney from a present client (a named plaintiff), but here the present client is forbidden to talk to the prospective client.

Fragile First Amendment rights are often lost or prejudiced by delay. *Nebraska Press Association v. Stuart, supra,* 427 U.S. at 609, 96 S.Ct. at 2826, 49 L.Ed.2d at 727 (Brennan, J., concurring); *Zwickler v. Koota,* 389 U.S. 241, 252, 88 S.Ct. 391, 397, 19 L.Ed.2d 444, 452 (1967); *Collin v. Smith,* 578 F.2d 1197, 1209 (7th Cir.), *cert. denied,* 439 U.S. 916, 99 S.Ct. 291, 58 L.Ed.2d 264 (1978); *A Quaker Action Group v. Hickel,* 421 F.2d 1111, 1116 (D.C. Cir. 1969); Barnett, *The Puzzle of Prior Restraint,* 29 Stan.L.Rev. 539, 545 (1977). Courts have therefore been commendably willing to expedite proceedings involving First Amendment rights. *See New York Times Co. v. U. S., supra,* (Supreme Court decision issued 15 days after first TRO, 17 days after initial publication). Here, during the pendency of the conciliation offer, potential class members were substantially deprived[17] of the opportunity to confer with the attorneys presumably most knowledgeable, concerning whether they should accept Gulf's offer or look to the suit for redress. At the time they most needed counsel they were cut off from the attorneys most available until the time to make a choice had expired.[18]

The ban on communications is especially egregious both because this is a race discrimination case and because the counsel silenced without factual showing include those from the Legal Defense Fund, recognized by the Supreme Court as having "a corporate reputation for expertness in presenting and arguing the difficult questions of law that

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17. *See* n. 16 *supra.*

18. The impact of the restraint in this case is exacerbated by the inevitable delay associated with appellate litigation. The court en banc decides this case almost four years after the ban on communications was entered.

frequently arise in civil rights litigation," *NAACP v. Button,* 371 U.S. 415, 422, 83 S.Ct. 328, 332, 9 L.Ed.2d 405, 411-12 (1963), and engaged in "a different matter from the oppressive, malicious, or avaricious use of the legal process for purely private gain." *Id.* at 443, 83 S.Ct. at 343, 9 L.Ed.2d at 424. *See also Miller v. Amusement Enterprises, Inc.*, 426 F.2d 534, 539 n.14 (5th Cir. 1970).

Faced with the principle that one who violates an injunction may not raise unconstitutionality as a defense in contempt proceedings, appellees construe the order to permit a defense to contempt. The constitutionally protected status of the proposed communication or the communicator's good faith belief in that status, appellees argue, would constitute a defense to contempt. This qualified defense is not found within the order but was read into it by the panel majority. 596 F.2d at 1261.

Even if this construction is correct, the defense is so freighted with preconditions and uncertainties that it is little comfort to attorney or party. Under appellees' construction, the filing requirement is a prerequisite to assertion of constitutionality, or good faith belief in constitutionality, as a defense.[19] Indeed it is only by the vehicle of the filing requirement that appellees read into the order a defense not otherwise available in a contempt case.[20] The filing requirement itself chills expression. With respect to the individual class members, filing within five days a

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19. It is not contended that the act of filing is an absolute defense to contempt. There would be little purpose in entering an order with such a meaning.

20. Facially the filing requirement is nothing more than a means of notice to the court, unrelated to a defense of contempt. No one advances this interpretation, and we doubt it was intended.

"complete summary" of every oral communication about the case had by each class member with any of his black fellow employees, is a practical impossibility. Beyond that, knowledge of what may be constitutionally protected is not readily available to the usual employee. In a real sense, for the individual plaintiffs silence is the only alternative. An attorney will have the knowledge, and better means, to file reports with the court as required, but if he asserts that he is constitutionally entitled to talk with prospective clients, ask financial aid, or seek support from a group or the community, filing will be a substantial burden. An attorney claiming a constitutional right to talk with witnesses could find compliance well nigh impossible. Also, the filing requirement arguably runs afoul of the attorneys' work product rule of *Hickman v. Taylor,* 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947).

The conditional defense is accompanied by a second chilling effect, the risk of trial on criminal contempt charges, with guilt or innocence possibly turning on whether one's assertion of constitutional protection has been made in "good faith." Moreover, the omissions and ambiguities of the order and possible differing constructions as to when, if at all, one is protected against contempt, accentuate the chilling effect.[21]

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21. For example, in addition to the general ban on communication, subparagrapn (a) of ¶ (2) expressly forbids solicitation. Prudent counsel very well may conclude that he cannot safely rely upon asserting constitutional protection in the face of this specific ban—if there is a "good faith" defense can counsel be in good faith if he does what he is expressly ordered not to do? As one commentator has noted:

> The proviso exempting constitutionally-protected communications does not eliminate—indeed it highlights—the overbreadth and resultant chilling effect of the Manual's proposed rule.

Note, 88 Harv. L. Rev. 1911, 1922 n.74 (1975). *See also Zarate v. Younglove,* 22 FEP Cases 1025, 1042 (C.D. Cal. 1980).

Most attorneys, faced with an order like the one before us,[22] would pursue the course chosen by counsel in this case and seek prior approval of the court before attempting to communicate with actual or potential class members. *See In re Halkin, supra,* 598 F.2d at 184 n. 15; *Goldblum v. National Broadcasting Corp.,* 584 F.2d 904, 907 (9th Cir. 1979).

Thus despite the filing provision, and the arguable "good faith" defense, the order has the "immediate and irreversible" effect of a prior restraint.

V. *The expression that is restrained is protected*

[8-10] Inquiry does not end with a determination that the order constitutes a prior restraint. The First Amendment is not absolute, and "the protection even as to previous restraint is not absolutely unlimited." *Near v. Minnesota, supra,* 283 U.S. at 716, 51 S.Ct. at 631, 75 L.Ed. at 1367; *accord, Times Film Corp. v. Chicago,* 365 U.S. 43, 81 S.Ct. 391, 5 L.Ed.2d 403 (1961); *Kingsley Books, Inc. v. Brown,* 354 U.S. 436, 77 S.Ct. 1325, 1 L.Ed.2d 1469 (1957). Material unequivocally not protected by the Constitution may be the subject of a prior restraint if sufficient procedural safeguards are provided. This possibility does not exist in the present case because the communications proscribed by the order are constitutionally protected. Also, as discussed in Part VI, below, procedural safeguards are entirely lacking.

The restraint on counsel's right to talk with potential class members about the case is plenary. The restraint is not limited to prohibiting solicitation of potential clients.

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22. The deficiencies are present in both the order and the suggested local rule. *See* n.6 *supra.*

The attorneys may not counsel a black employee free of any effort to solicit him. We have already noted, at the beginning of Part IV, the concern expressed by the Third Circuit in *Rodgers I*, 508 F.2d at 162-63, 165, over the constitutional problems raised by conditioning access to class action procedures upon prohibiting communications between counsel and potential class members.

In addition to the general restraint on attorneys there is a specific restriction against solicitation in subparagraph (a) of ¶ (2) of the order which forbids "solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action." *NAACP v. Button, supra,* and its progeny, *In re Primus,* 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978), *United Transportation Union v. State Bar,* 401 U.S. 576, 91 S.Ct. 1076, 28 L.Ed.2d 339 (1971), *United Mine Workers v. Illinois Bar Association,* 389 U.S. 217, 88 S.Ct. 353, 19 L.Ed.2d 426 (1967), and *Brotherhood of Railroad Trainmen v. Virginia State Bar,* 377 U.S. 1, 84 S.Ct. 1113, 12 L.Ed.2d 89 (1964), mandate the conclusion that subparagraph (a) proscribes constitutionally protected expression. In *Button,* the Court concluded that NAACP solicitation of persons to bring civil rights suits was protected activity under the First and Fourteenth amendments. 371 U.S. at 428-29, 83 S.Ct. at 335, 9 L.Ed.2d at 415.[23] The solicitation was treated as a mode of political expression effectuated through group activity falling with the sphere of associational rights guaranteed by the First Amendment. The solicitation activities considered in *Button* included holding meetings to explain legal steps needed to achieve desegregation. At

23. Because this case involves a restriction imposed by a federal court, the Fourteenth Amendment is not implicated.

these meetings forms were circulated which authorized Legal Defense Fund attorneys "to represent the signers in legal proceedings to achieve desegregation." 371 U.S. at 421, 83 S.Ct. at 332, 9 L.Ed.2d at 411.

In view of Gulf's statements to the trial court and the countering affidavit by plaintiffs' attorney, we do not know whether there has been express solicitation in this case similar to the distribution of forms in *Button*. Whether plaintiffs' attorneys' attendance at the meeting was solicitation is not determinative. Here, as in *Button*, the subject matter is racial discrimination. Plaintiffs' attorneys are already engaged on behalf of black employees in seeking to vindicate their civil rights through court action, while in *Button* they were seeking clients to begin a suit. In both cases the activities at issue are those of Legal Defense Fund lawyers. The only material difference is that here employees must choose between the lawsuit and a conciliation offer while in *Button* there had been no conciliation and offer. The people attending the meetings held by the Legal Defense Fund lawyers in *Button*, however, did have to choose between initiating a lawsuit and not participating in a lawsuit. The type of choice the people would have to make here and in *Button* is not so different that the solicitation that could have occurred in this case was outside the scope of activity protected by *Button*. The characteristics of the solicitation that brought it within constitutional protection in *Button* are equally present in this case. *See also Great Western Cities, Inc. v. Binstein*, 476 F.Supp. 827 (N.D. Ill. 1979) (holding rule similar to district court's order constitutionally inapplicable to non-profit solicitation).

The continued vitality of *Button* was recently affirmed by the Supreme Court in *In re Primus, supra*. There the

Court reversed a disciplinary reprimand issued against an ACLU lawyer for solicitation. The Court considered the economic relationship between the lawyer and the person solicited, the purpose of the litigation and the possibility of a conflict of interest between counsel and prospective client. Because the lawyer had no direct financial stake in the case, and the case was a means of expressing a political belief, and there was no evidence of overreaching or misrepresentation, the Court concluded that South Carolina's punishment of Primus for solicitation violated her First Amendment rights.[24] Counsel for plaintiffs here have submitted affidavits attesting to the fact that they neither received nor expect to receive from class members any compensation for their services.[25]

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24. *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978), decided the same day as *Primus,* sustained, against constitutional objections, bar sanctions of an attorney for solicitation. For purely pecuniary gain, he visited in the hospital a person injured in an automobile accident and solicited her as a client. No political expression or associational rights or vindication or illegal racial discrimination was involved. Ohralik based his constitutional claim solely on the commercial speech doctrine. *See also Pace v. Florida,* 368 So.2d 340 (Fla. 1979); *Adler, Barish, Daniels, Levin & Creskoff v. Epstein,* 482 Pa. 416, 393 A.2d 1178 (Pa. 1978).

25. Thus, subparagraph (b) of ¶ (2) of the order is not directly applicable. Arguably this hypothetical restraint does no injury except to the extent it adds to the overall chilling effect. However, it is appropriate to comment on it since it is part of the *Manual's* form. In *United Transportation Union v. State Bar, supra,* the Supreme Court interpreted *Button* and cases following it to stand for the proposition that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right withn the protection of the First Amendment." *Id.* at 585, 91 S.Ct. at 1082, 28 L.Ed.2d at 347. In at least some situations the collection or solicitation of funds to defray litigation costs is a necessary adjunct to obtaining meaningful access to the courts. Such activity is therefore deserving of constitutional protection in appropriate cases. The degree of protection would vary according to the use to which the funds are to be put. If they are to be used to pay lawyers, the solicitation is closer to the heart of gaining access to the courts. *See Norris v. Colonial Com-*

[11] Of course, the communications of individual plaintiffs, also proscribed by the order, are at least equally protected. *See Brotherhood of Railroad Trainmen v. Virginia State Bar, supra; Great Western Cities, Inc. v. Binstein, supra.*

The communications covered by the order are thus protected expressions which call into play the fully panoply of First Amendment safeguards against prior restraint.[26]

VI. *The prior restraint is not justified*

The order in this case is the essence of prior restraint—it places specific communications under the personal censorship of a judge. It is thus subject to the heavy presumption against its constitutionality and the rigid requirements imposed by the courts on those who seek to justify prior restraints. It must fit within one of the narrowly defined exceptions to the prohibition against prior restraints. It must prevent direct, immediate and irreparable damage, and it must be the least restrictive means of doing so. Finally, it must comport with required procedural safe-

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mercial Corp., 77 F.R.D. 672, 673 (S.D. Ohio 1977) (solicitation of funds to defray litigation expenses of class action permitted with certain requirements imposed on the content of the solicitation letter). *See also Sayre v. Abraham Lincoln Federal Savings & Loan Ass'n*, 65 F.R.D. 379, 384-86 (E.D. Pa. 1974), *modified*, 69 F.R.D. 117 (1975); *see generally* Note, *Solicitation By Attorneys: A Prediction and a Recommendation*, 16 Houston L. Rev. 452 (1979).

26. We do not discuss at length the plenary provisions of subparagraph (d) of ¶ (2) concerning statements tending to misrepresent. That section merely compounds the unconstitutionality exhibited by the preceding sections by adding vagueness and overbreadth to its defects. *See Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979) (en banc); *Zarate v. Younglove*, 22 FEP Cases 1025, 1942 (C.D. Cal. 1980); *U. S. v. Marcano Garcia*, 456 F.Supp. 1354 (D.P.R. 1978); Note, 88 Harv. L. Rev. 1911, 1922 n.74 (1975).

guards. The order at issue meets none of these requirements.

[12] There is a strong presumption against the constitutionality of any prior restraint, and the burden of justification is therefore heavier than that imposed in cases involving only subsequent restrictions on freedom of expression. *Southeastern Promotions, Ltd. v. Conrad, supra; New York Times Co. v. U. S., supra; Organization for a Better Austin v. Keefe, supra; Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963); *Near v. Minnesota, supra; Penthouse Int'l Ltd. v. McAuliffe, supra; Universal Amusement Co. v. Vance,* 587 F.2d 159 (5th Cir.), *aff'd,* ____U.S.____, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980).

[13] In general, a prior restraint may be justified only if the expression sought to be restrained "surely [will] result in direct, immediate, and irreparable damage." *International Society for Krishna Consciousness v. Eaves,* 601 F.2d 809, 833 (5th Cir. 1979), *quoting New York Times Co. v. U. S., supra,* 403 U.S. at 730, 91 S.Ct. at 2149, 29 L.Ed.2d at 834. At least three justices may have rejected even that standard as overly lenient, without explicitly defining the appropriate test. *See New York Times Co. v. U. S., supra,* 403 U.S. at 732-33, 91 S.Ct. at 2150-51, 29 L.Ed.2d at 835 (White, J., joined by Stewart, J., concurring), and 403 U.S. at 740-41, 91 S.Ct. at 2154-55, 29 L.Ed.2d at 840 (Marshall, J., concurring).[27]

[14] To be lawful, the restraint "must fit within one of the narrowly defined exceptions to the prohibition

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27. Justices Black and Douglas, adhering to their consistent rejection of any restriction on freedom of expression, also found the standard unacceptable. 403 U.S. at 714, 720, 91 S.Ct. at 2141, 2144, 29 L.Ed.2d at 825, 828.

against prior restraints," *Southeastern Promotions, Ltd. v. Conrad, supra,* 420 U.S. at 559, 95 S.Ct. at 1247, 43 L.Ed.2d at 459; that is, "[the] publication [sought to be restrained] must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea. . . ." *New York Times Co. v. U. S., supra,* 403 U.S. at 726-27, 91 S.Ct. at 2148, 29 L.Ed.2d at 832 (Brennan, J., concurring); *see also Whitney v. California,* 274 U.S. 357, 377, 47 S. Ct. 641, 71 L.Ed. 1095, 1106) (Brandeis, J., concurring) ("Only an emergency can justify repression"). Indeed, one commentator has interpreted *New York Times v. U. S.* to hold that "there is a constitutional requirement that everything, or virtually everything, is entitled to be published at least once." Kalven, *supra,* 85 Harv. L. Rev. at 34.

[15-17] The order is not brought within any exception permitting prior restraints merely because it arises in the general context of the administration of justice and the particular context of Rule 23. As the Third Circuit noted in *Rodgers I*: "[T]he interest of the judiciary in the proper administration of justice does not authorize any blanket exception to the first amendment." 508 F.2d at 163. It is obvious that in the conduct of trial the judge restrains expression and association in innumerable ways. But, "[w]hatever may be the limits of a court's powers in this respect, it seems clear that they diminish in strength as the expressions and associations sought to be controlled move from the courtroom to the outside world." *Id.*

[18, 19] The Supreme Court has recently reaffirmed that even when the competing interest is a criminal defendant's right to a fair trial, "the barriers to prior restraint remain high and the presumption against its use

continues intact." *Nebraska Press Association v. Stuart, supra,* 427 U.S. at 570, 96 S.Ct. at 2808, 49 L.Ed.2d at 704. Other courts, including this one, have echoed this sentiment. "[B]efore a prior restraint may be imposed by a judge, even in the interest of assuring a fair trial, there must be 'an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil.' " *U. S. v. Columbia Broadcasting System, Inc.,* 497 F.2d 102, 104 (5th Cir. 1974). A lawyer's First Amendment right to comment about pending or imminent criminal litigation can be proscribed only if his comments pose a " 'serious and imminent threat' of interference with the fair administration of justice." *Chicago Council of Lawyers v. Bauer, supra,* 522 F.2d at 249, *quoting In re Oliver,* 452 F.2d 111 (7th Cir. 1971). Even in the context of a criminal defendant's right to a fair trial, then, prior restraint is "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Association v. Stuart, supra,* 427 U.S. at 559, 96 S.Ct. at 2803, 49 L. Ed.2d at 697.

[20-22] If the exigencies of the Sixth Amendment do not lessen the burden on those who seek to justify prior restraints, the interests of a civil litigant cannot do so. *See Hirschkop v. Snead, supra,* 594 F.2d at 373. The "interest of the judiciary in the proper administration of justice does not authorize any blanket exception to the first amendment." *Rodgers I, supra,* 508 F.2d at 163. Thus, the general presumption against prior restraints is not mitigated by a claim that the fair and orderly administration of justice is at stake.[28]

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28. We must distinguish two types of cases as only peripherally relevant to the inquiry at hand. *Craig v. Harney,* 331 U.S. 367, 67

[23-28] Nor does Rule 23, as a specific aspect of the administration of justice, create an exception to the principles governing prior restraints.[29] *See Rodgers v. U. S. Steel Corp.*, 536 F.2d 1001, 1008 (3d Cir. 1976) (*Rodgers*) (suggesting, in context of class action, that test is "clear and present danger or a reasonable likelihood of a serious and imminent threat to the administration of justice"). The validity of a prior restraint entered under Rule 23 must be tested by the same standards utilized in

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S.Ct. 1249, 91 L.Ed. 1546 (1947), and *Bridges v. California*, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192 (1941), and their progeny limited the circumstances under which courts may impose contempt sanctions for free expression that is subsequently deemed prejudicial to the administration of justice. Because the contempt in those cases was not based on violation of an explicit order, however, the cases "deal with problems substantially different from those raised by prior restraint." *Nebraska Press Ass'n v. Stuart*, *supra*, 427 U.S. at 557 n.5, 96 S.Ct. at 2802, 49 L.Ed.2d at 696 n.5; *see also Rodgers v. U. S. Steel Corp.*, 536 F.2d 1001, 1008 n.15 (3d Cir. 1976) (*Rodgers II*); Schmidt, Nebraska Press Association: *An Expansion of Freedom and Contraction of Theory*, 29 Stan. L. Rev. 431, 472 (1977). Thus, the *Manual's* conclusion that *Craig* and *Bridges* authorize the suggested order, Part 1, § 1.41 n.33 (1977 ed.), is mistaken insofar as the order is a prior restraint and governed by a more stringent standard. *See* Wilson, *Control of Class Action Abuses Through Regulation of Communications*, *4 Class Action Reports* 632, 634 (1975).

We also find *Gannett Co. v. DePasquale*, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979), and its antecedents inapposite. We are dealing here not with the right of reporters to gather information but with the right of individuals to disseminate it. *See, e.g., Houchins v. KQED, Inc.*, 438 U.S. 1, 98 S.Ct. 2588, 57 L.Ed.2d 553 (1978); *U. S. v. Gurney*, 558 F.2d 1202 (5th Cir. 1977), *cert. denied*, 435 U.S. 968, 98 S.Ct. 1606, 56 L.Ed.2d 59 (1978). Protecting secrecy by excluding the press is not to be equated with preventing publication. *See* Sack, principle and Nebraska Press Association v. Stuart, 29 Stan. L. Rev. 411, 428 (1977); Stevens, *Some Thoughts About A General Rule*, 21 Ariz. L. Rev. 599 (1979).

29. The district court never certified a class in this case. Arguably a court may have broader power over an actual class action than a putative class action, but the presence or absence of certification does not materially affect the considerations that we view as controlling.

other contexts. Subdivision (d) of Rule 23, which authorizes the court, in its discretion, to make appropriate orders in class actions, was designed to further "the fair and efficient conduct of the action. . . ." Advisory Committee Notes to Rule 23. Like the common law contempt power at issue in *Craig v. Harney,* 331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed. 1546 (1947), and *Bridges v. California,* 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192 (1941), the court's discretion under Rule 23 is a facet of its general authority to regulate the conduct of litigation. To the extent that Rule 23 implements the class action as a unique litigation device, that discretion may be correspondingly broadened, and we recognize broad management powers of the court under Rule 23. But, while a legislative enactment may alter the court's authority under common law, it may not encroach upon constitutionally protected rights. Prior restraints are no less suspect in a statutory setting than they are in a constitutional context. *Allen v. Monger,* 583 F.2d 438, 442 (9th Cir. 1978), *pet. for cert. filed sub nom., Brown v. Allen,* ____U.S.____, 100 S.Ct. 1003, 62 L.Ed. 2d 745 (1978). We cannot interpret Rule 23 as authorizing prior restraints without rewriting the First Amendment and the gloss put upon it by the Supreme Court. This, of course, we are not at liberty to do. Moreover, the Rules Enabling Act, 28 U.S.C. § 2072, explicitly provides that the Rules "shall not abridge, enlarge or modify any substantive right." Finally, much of the communication prohibited by the order is both constitutionally protected and consistent with the purposes of the class action. *See Coles v. Marsh,* 560 F.2d 186, 189 (3d Cir.), *cert. denied,* 434 U.S. 985, 98 S.Ct. 611, 54 L.Ed.2d 479 (1977)); n. 30 *infra.*

[29, 30] An exception to the constitutional principles limiting prior restraints cannot be constructed on the foundation of asserted potential abuses in class actions generally. In the first place, the hypothesis that abuses occur with such frequency and impact that prophylactic judicial intervention is required must be examined with the same scrutiny as other factual hypotheses. Neither the Constitution nor the judge's duty of constitutional fact finding is subsumed by the application of the pejorative word "abuse." Not everything that tends to make a class action less convenient than ideal, or more difficult to manage, is an "abuse." The same is true of such activities as solicitation of clients, or funds, or community support, that may be constitutionally protected but, at least to some, may appear only marginally ethical.[30] The frequency and the effect of genuine abuses in class actions in general are not revealed by any empirical data made known to us, and judges may differ widely in their individual assessments. The *Manual* expressly recognizes that "abuse" of the class action is a rare occurrence, an exception and not the rule:

> It must be noted, however, that, generally, the experience of the courts in class actions has been fa-

30. In *Coles v. Marsh*, 560 F.2d 186 (3d Cir.), *cert. denied*, 434 U.S. 985, 98 S.Ct. 611, 54 L.Ed.2d 479 (1977), a race/sex discrimination in employment case, the basis for an order banning communication by plaintiff and her lawyer was plaintiff's deposition in which she indicated that she had contacted and would continue to contact potential class members with the hope of interesting them in participating in the suit and had contacted the NAACP to enlist its support, financial and otherwise, and proposed to contact other organizations for the same purpose. The Third Circuit rejected the argument that these were abuses and held they effectuated the purposes of Rule 23 by encouraging participation in plaintiff's race/sex discrimination claim and that the district court had no power to restrain them.

> vorable. The aforementioned abuses are the exceptions in class action litigation rather than the rule. Nevertheless, they support the idea that it is appropriate to guard against the occurrence of these relatively rare abuses by local rule or order.

Manual, Part I, § 1.41, p. 31 (1977 ed.). Its rationale is that it is desirable to anticipate and prevent these infrequent occurrences before they happen.[31]

In any event, the potential abuse rationale is at odds with the requirement that a prior restraint is only justified in exceptional circumstances and by a showing of direct, immediate and irreparable harm. Whether such a showing can be made may be affected by a host of factors: the occurrence of misconduct or the threat of it, the composition and size of the class, the nature of the claim, the historical policies of the district court in administering class actions, the identity, experience and standards of the lawyers, the mores of the bar, the necessity for discovery and many others. None of the four major potential abuses listed by the *Manual* presents any direct or immediate threat to the litigation in this case. Solicitation of clients is protected here under *Button* and *Primus. See* pp. 471-473, *supra.* The possibility of solicitation of funds is controverted by affidavits. *See* n. 25 *supra.* Solicitation of opt-out requests is not relevant to this Rule 23(b)(2) case. Finally, nothing justifies any inference in this case that communications are likely to "misrepresent the status,

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31. *Compare Bulletin of Recent Developments, Manual for Complex Litigation,* Aug. 25, 1978, p. 7:

> Experience continues to teach that, because of the vast and ever-present potential for abuse of the class action through unauthorized communications in many unpredictable forms, it is dangerous to await the occurrence of an abuse before trying to correct it.

purposes and effects of the . . . action and of . . . [the] Court orders therein."

[31] There are other prerequisites to justification of a prior restraint. It must not sweep too broadly. Rather it "must be narrowly drawn and cannot be upheld if reasonable alternatives are available having a lesser impact on First Amendment freedoms." *CBS, Inc. v. Young,* 522 F.2d 234, 238 (6th Cir. 1975); *see also Nebraska Press Association v. Stuart, supra; Carroll v. Commissioners of Princess Anne,* 393 U.S. 175, 89 S.Ct. 347, 21 L.Ed.2d 325 (1968). There are alternatives to a total ban on communications. *See* n. 13 *supra; Developments in the Law—Class Actions,* 89 Harv. L. Rev. 1318, 1600-1604 (1976); Wilson, *Control of Class Action Abuses Through Regulation of Communications,* 4 Class Action Reports 632 (1975). The order before us suppresses essentially everything, and one seeking to exercise his right to speech or association must petition the court.[32] No showing has been made, or even offered, that reasonable alternatives with lesser impact are unavailable.

[32] Finally, the restraint "must have been accomplished with procedural safeguards that reduce the danger of suppressing constitutionally protected speech." *Southeastern Promotions, Ltd. v. Conrad, supra,* 420 U.S. at 559, 95 S.Ct. at 1247, 43 L.Ed.2d at 459. There are none here: no evidence, no way to test the potential abuse premise, no findings of particular abuses present or threatened, and no conclusions of law (except as to the desirability of conciliation). Obviously, there never can be procedural safeguards if by rule or order a whole-

32. It is obvious that overbreadth is inevitable under a system by which plenary restraints are imposed automatically by rule or order in every actual or potential class action.

sale restraint is directed in every case and those restrained are able to escape its impact only by showing good cause to be excepted or risking the vagaries of an arguable good faith defense.

[33] The remaining justification for the order is the district judge's reference to his obligations to encourage private settlement of Title VII charges. *U. S. v. Allegheny-Ludlum Industries,* 517 F.2d 826, 846 (5th Cir. 1975), *cert. denied,* 425 U.S. 944, 96 S.Ct. 1684, 48 L.Ed.2d 187 (1976). The notice sent by the clerk gave judicial recognition to the conciliation agreement and extended the time during which employees could accept Gulf's offer, while at the same time giving notice of the pendency of this suit. But, as we noted in *Allegheny-Ludlum,*

> the "final responsibility for enforcement of Title VII is vested with federal courts," . . . [T]he various legal remedies for employment discrimination are cumulative and complementary. From the grievant's standpoint, "[u]nder some circumstances, the administrative route may be highly preferred over the litigatory; under others the reverse may be true."

Id. at 848 n. 26, *quoting Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 44, 94 S.Ct. 1011, 1017, 39 L.Ed.2d 147, 156 (1974), and *Johnson v. Railway Express Agency, Inc.,* 421 U.S. 454, 461, 95 S.Ct. 1716, 1720, 44 L. Ed.2d 295, 302 (1975). In *Rodriguez v. East Texas Motor Freight,* 505 F.2d 40 (5th Cir. 1974), *vacated on other grounds,* 431 U.S. 395, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977), we commented on the possible divergence of governmental interests in remedying employment discrimination and the interests of the individuals who were the victims of discrimination:

> While the Government may be willing to compromise in order to gain prompt, and perhaps nationwide, relief, private plaintiffs, more concerned with full compensation for class members, may be willing to hold out for full restitution.

Id. at 66. The choice between the lawsuit and accepting Gulf's back pay offer and giving a general release was for each black employee to make. The court could not make it for him, nor should it have freighted his choice with an across-the-board ban that restricted his access to information and advice concerning the choice.

[34, 35] We therefore hold that the district court's order restricting communication by parties and their counsel with actual and potential class members is an unconstitutional prior restraint.[33] This holding makes it un-

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33. While we hold that the order is a prior restraint, the unconstitutionality of the order does not rest on that ground alone. Even under the more relaxed analysis accorded subsequent restraints the order fails to pass constitutional muster. Much of the order is vague and overbroad. *See* n.26 *supra; see also Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 249 (7th Cir. 1975), *cert. denied*, 427 U.S. 912, 96 S.Ct. 3201, 49 L.Ed.2d 1204 (1976). Even a legitimate governmental purpose "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker*, 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed.2d 231, 237 (1960); *see also Village of Schaumberg v. Citizens for a Better Environment*, ____U.S.____, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980) (restriction invalid if purpose "could be sufficiently served by measures less destructive of First Amendment interests"). Moreover, the circumstances under which the order was issued do not meet any of the previously articulated standards governing restriction of constitutionally protected expression. *See, e.g., Villiage of Schaumberg v. Citizens for a Better Environment, supra* (regulation "intimately related to substantial governmental interests"); *Hess v. Indiana*, 414 U.S. 105, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973) (speech "intended to produce, and likely to produce, *imminent* disorder"); *Brandenburg v. Ohio*, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) (speech "brigaded with action") (Douglas, J., concurring); *Bridges v. California*, 314 U.S. 252, 62

necessary for us to consider whether the order violates the First Amendment associational rights of either the individual plaintiffs or their attorneys. *See Rodgers I, supra,* 508 F.2d at 163; *Great Western Cities, Inc. v. Binstein, supra,* 476 F.Supp. at 834; *cf. NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed. 2d 1488 (1958) (requiring NAACP to submit membership lists infringes associational rights); *Shelton v. Tucker,* 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960) (requiring list of organizations to which individual belongs or contributes infringes associational rights); *Robinson v. Reed,* 566 F.2d 911 (5th Cir. 1978) (requiring disclosure of facts about beliefs or associations infringes rights of privacy and association).[34]

S.Ct. 190, 86 L.Ed. 192 (1941) ("clear and present danger"); *Chicago Council of Lawyers v. Bauer, supra* (speech must pose " 'serious and imminent threat' of interference with the fair administration of justice").

34. We have also pretermitted discussion of the order's limitation on access to and dissemination of discovery materials as possibly implicating both the First Amendment, *In re Halkin, supra,* 598 F.2d at 188-89, and the due process clause of the Fifth Amendment, *Goulaman v. Seligman & Latz of Houston, Inc.,* 82 F.R.D. 727, 728 (S.D. Tex. 1979). *See Waldo v. Lakeshore Estates, Inc.,* 433 F.Supp. 782, 787 (E.D. La. 1977); Note, 88 Harv. L. Rev. 1911, 1919 (1975). The *Manual* itself notes the risk that barring contact with class member-witnesses may violate due process:

> In many such cases, the class members will have knowledge of facts relevant to the litigation and to require a party to develop the case without contact with such witnesses may well constitute a denial of due process.

Manual, Part I, § 1.41, p. 29 (1977, carried forward from 1973 ed.).

Additionally, we have not considered whether the order may violate the Fifth Amendment privilege against self-incrimination by compelling those who may have disobeyed it to produce testimonial evidence describing their transgressions. *See U. S. v. White,* 322 U.S. 694, 64 S.Ct. 1248, 88 L.Ed. 1542 (1944); *U. S. v. Authement,* 607 F.2d 1129 (5th Cir. 1979).

VII. *The order violates Rule 23*

[36] Because we hold that the order violates the First Amendment, it follows that it cannot be an "appropriate order" under Rule 23(d) of the Federal Rules of Civil Procedure.[35]

The order of the district court restricting communications by named plaintiffs and their counsel with actual and potential class members is VACATED, the judgment of the district court is REVERSED and the case is REMANDED to the district court for proceedings consistent with this opinion.

TJOFLAT, Circuit Judge, with whom JOHN R. BROWN, GEE, HENDERSON and REAVLEY, Circuit Judges, join, specially concurring:

I concur only in the result because I believe the majority's analysis inexcusably ignores the principle that "a federal court should not decide federal constitutional questions where a dispositive nonconstitutional ground is available." *Hagans v. Lavine,* 415 U.S. 528, 547, 94 S. Ct. 1372, 1384, 39 L.Ed.2d 577 (1974). The non-constitutional ground that would dispose of the case is that the district court abused its discretion when, without making any findings of fact, it entered the order restricting the parties' and counsel's communications with actual or potential class members who were not formal parties.

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35. Other circuits have reached conflicting conclusions as to the propriety under Rule 23 of similar orders. *Compare Rodgers I, supra with In re General Motors Corp. Engine Interchange Litigation,* 594 F.2d 1106, 1138 n.57 (7th Cir.), *cert. denied,* 444 U.S. 870, 100 S.Ct. 146, 62 L.Ed.2d 95 (1979).

The majority's analysis begins with an examination of the "basis" of the order. The opinion immediately rejects the notion that the district court's order could have rested on Gulf Oil Company's unsworn allegations that one of the plaintiffs' attorneys had improperly communicated with actual or potential class members who were not formal parties: "We can assume that the district court did not ground its order on a conclusion that the charges of misconduct made by Gulf were true. Nothing in its order indicates that it did. . . ." *Ante* at 466. Even if the district court had based its order on a conclusion that Gulf's charges were true, the opinion reasons, "such a conclusion would have been procedurally improper and without evidentiary support." *Id.* Therefore, the majority "presumes" that the district court must have based its order "upon the rationale of the [*Manual for Complex Litigation*] that the court has the power to enter a ban on communications in any actual or potential class action as a prophylactic measure against potential abuses envisioned by the *Manual.*" *Id.*

Logic and sound jurisprudence insist that the majority next consider the procedural propriety and evidentiary support of an order founded solely on the rationale and model order of the *Manual.* Instead, the opinion inexplicably leaps to the question of the constitutionality of the *Manual's* suggested order and holds that the order is an unconstitutional prior restraint. Since the district court's order was based entirely on the model order and policy considerations set out in the *Manual,* it follows that the district court's order is unconstitutional as well. The opinion then belatedly and, in light of the disposition of the constitutional issue, somewhat gratuitously turns to the question of procedural propriety, concluding that an un-

constitutional order cannot be "appropriate" within the meaning of Fed. R. Civ. P. 23(d).

In my view, the federal policy of avoiding unnecessary constitutional rulings requires that this court reserve consideration of the first amendment problems that the district court's order may raise and address first the question of the district court's authority to issue the order. As Judge Godbold persuasively demonstrates in his dissenting opinion to the panel decision, the district court misused its discretion in entering the order in this case. *Bernard v. Gulf Oil Co.*, 596 F.2d 1249, 1262-76, *vacated*, 604 F. 2d 449 (5th Cir. 1979) (Godbold, J., concurring in part and dissenting in part). Therefore, we need not reach the constitutional question.

Rule 23(d) permits district courts, in conducting class actions, to "make appropriate orders: . . . (3) imposing conditions on the representative parties . . ." Although this provision gives a district court "extensive power" to manage a class action, 7A C. Wright & A. Miller, Federal Practice and Procedure § 1791 at 192 (1972), the orders that a court issues pursuant to the rule are certainly subject to review for abuse of discretion. *In re Nissan Motor Corporation Antitrust Litigation*, 552 F.2d 1088, 1096 (5th Cir. 1977). As this court observed in *Nissan*, "Appellate review is necessary to assure that the rights of absentee class members are not inundated in the wake of a district court's brisk supervision." *Id.* The reviewability of rule 23(d) orders is also implicit in the language of the rule. The district court is limited to issuing those orders that are "appropriate." If this constraining language is to be effectual, rule 23(d) orders must be reviewable by the courts of appeals.

Since rule 23(d) orders are reviewable, it follows that such orders must be based on findings of fact:

> [I]ssuance of an order . . . without an adequate statement of the reasons for the order does not meet minimum standards of procedural fairness and regularity. . . . Nor does an order issued without a deliberate articulation of its rationale, including some appraisal of the factors underlying the court's decision, allow for a disciplined and informed review of the court's discretion.

Sargeant v. Sharp, 579 F.2d 645, 647 (1st Cir. 1978) (citations omitted) (vacating and remanding district court's order denying attorney fees to successful civil rights plaintiff). *Cf.* Fed. R. Civ. P. 52(a) ("in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action").

The general principle restated by the *Sargeant* court applies to any court order that is based on the court's assessment of conflicting evidence or policy considerations. I see no reason to suppose that the principle is not pertinent here. A request for a rule 23(d) order restricting communications between counsel and potential or actual class plaintiffs is not essentially different from an ordinary petition for a preliminary injunction.[1] Communications

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1. Judge Godbold makes this point nicely in his panel dissent:
> The wide disparity between what was done here and normal judicial procedures is demonstrated by posing this question: "What would have happened if Gulf had asked for a temporary injunction imposing the exact restrictions that were imposed in this case?" I believe that the court would have insisted upon requirements of notice, time limits, proof of likelihood of harm, the public interest and similar familiar requirements, and this

like those prohibited by the district court's order certainly create a potential for abuse, but they may also be beneficial. For example, such communications, "in many instances serve to effectuate the 'purposes of Rule 23 by encouraging common participation in [a lawsuit].'" *Bernard v. Gulf Oil Co.*, 596 F.2d at 1268 (Godbold, J., dissenting) (*quoting Coles v. Marsh*, 560 F.2d 186, 189 (3d Cir.), *cert. denied*, 434 U.S. 985, 98 S.Ct. 611, 54 L.Ed.2d 479 (1977). Just as if it had been faced with a request for an injunction, the district court should have ruled on Gulf's motion for an order restricting communications only after weighing, on the record, the potential for abuse that would be generated by permitting free communications between the parties and class members against the benefits flowing from such communications. As in the ordinary case involving a request for a temporary injunction, the burden of proof would be on the movant—here, Gulf. To meet its burden of proof, Gulf would have to make "a factual showing . . . that unsupervised communications between counsel and named plaintiffs on one hand and potential class members on the other have materialized into actual abuses of the class action device or that abuses are imminently threatened." *Bernard v. Gulf Oil Co.*, 596 F.2d at 1267 (Godbold, J., dissenting).

As the majority opinion notes, the district court entered the order in this case without making any findings of fact. The only "evidence" Gulf presented that the restricted communications would lead to abuses was unsworn allegations of misconduct on the part of one of the class at-

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court would have reviewed an injunction under the usual standards, especially since constitutional rights are involved.

Bernard v. Gulf Oil Co., 596 F.2d 1249, 1270, *vacated* 604 F.2d 449 (5th Cir. 1979) (Godbold, J., concurring in part and dissenting in part).

torneys, and the accused attorney denied the charge under oath. Even if the district court had explicitly based its order on Gulf's charges, I would find that entry of the order was an abuse of discretion on the ground that Gulf had not conceivably met its burden of proof. It is still more clear that the Court abused its discretion by issuing the order without elucidating *any* factors that contributed to its decision.

The absence of any findings of fact leads the majority to conclude that the district court founded its order on the *Manual for Complex Litigation's* model order and rationale. *Ante* at 466. In my view, the record does not adequately support this conclusion. The district court cited the *Manual* not to justify the imposition of the order, but to defend the order from plaintiffs' First Amendment attack: "[T]his order comports with the requisites set out in the *Manual for Complex Litigation,* Section 1.41 p. 106 CCH Edition 1973, which specifically exempts constitutionally protected communications when the substance of such communication is filed with the Court." *Record* at 128e. The court's mere mentioning of the *Manual* obviously does not constitute the deliberate articulation of rationale that is necessary if there is to be any possibility of meaningful review.

Moreover, even if the court had relied explicitly on the rationale of the *Manual*'s model order to support the order, the court's entry of the order would have been procedurally improper. The *Manual* is not a source of authority with the force of a statute or rule of civil procedure. Therefore, a trial court could not evade its responsibility to make findings of fact on the record simply by relying on the *Manual.* In other words, it would have been an

abuse of discretion for the court to have adopted the *Manual's* apparent conclusion that a court order restricting communications is appropriate in *every* class action. This is because the validity of the *Manual's* analysis and conclusion is not the sort of undisputed knowledge that would justify what would be, in effect, judicial notice. Since there is reason to believe that communications between counsel and actual and potential class members are not *always* abusive of the class action device, "[t]he *Manual's* general discussion of potential abuses flowing from unrestrained communications is no substitute for reasoned inquiry into the harms and benefits on the particular facts of each case." *Bernard v. Gulf Oil Co.*, 596 F.2d at 1268 (Godbold, J., dissenting).[2]

For the reasons I have stated, I would hold that the district court abused its discretion when it entered the order restricting communications. I think this conclusion is unavoidable, whether the order is viewed as based upon the trial judge's assessment of the particular case before him or as based on the *Manual's* general discussion of potential abuses. Therefore, I must regard the majority's

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2. Of course, there are some communications that a court may restrict, in the interests of the administration of justice, without making findings or even considering the facts of the particular case. For example, a trial judge may certainly instruct members of the jury not to discuss a case with anyone while the trial is in progress. The crucial difference between this example and the case before us is that, first amendment considerations aside, there could be no purpose served by permitting the jury to discuss a case during the trial, while it is not open to question that such communications would always pose an imminent threat to the fair administration of justice. On the other hand, communications like those enjoined in the present case might actually benefit the judicial process through serving the rule 23 policy of encouraging common participation in a lawsuit. *See* p. 464, *supra*.

first amendment analysis as a needless excursion into a difficult and little-explored area of constitutional law.[3]

FAY, Circuit Judge, with whom COLEMAN, Chief Judge, and RONEY, Circuit Judge, join, special concurring statement:

The majority of the *en banc* court adopts parts I, II and III of the panel opinion found at 596 F.2d 1249. As to the order dealing with communications by named parties and their counsel with any actual or potential class member not a formal party, I adopt parts I and II of Judge Godbold's original opinion, concurring in part and dissenting in part from the panel majority. 596 F.2d at 1262. In my opinion the order was "inappropriate" under Rule 23 and an abuse of discretion in this case. So concluding, I would not reach the constitutional issues.

JAMES C. HILL, Circuit Judge, dissenting:

I cannot agree that an order restricting the conduct of attorneys and their clients in connection with an ongoing lawsuit should be scrutinized under the First Amendment. I believe that during the pendency of a lawsuit the judge may restrict speech and conduct which in a different setting would be protected by the First Amendment. A

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3. Although the majority concludes that the order in this case was an unconstitutional prior restraint, the opinion certainly does not preclude a district court's entering an order similar to the *Manual's* model order after making a proper finding of facts. The majority condemns only restrictions of communications "constructed on the foundation of asserted potential abuses in class actions generally," *ante* at 475, and admits that a "prior restraint" may be justified "by a showing of direct, immediate and irreparable harm." *Ante* at 476.

precedent which requires that such orders be scrutinized under the First Amendment is a dangerous one with the potential for consequences not intended by the majority.

The propriety of this order should be tested only under Rule 23's appropriateness standard. Under the facts of this case, I would hold that the order was appropriate.

APPENDIX B

Memorandum Decision of the United States Court of Appeals Granting a Rehearing *En Banc*, Dated September 27, 1979

Wesley P. BERNARD, et al.,
Plaintiffs-Appellants,

v.

GULF OIL COMPANY, et al.,
Defendants-Appellees.

No. 77-1502.

United States Court of Appeals,
Fifth Circuit.

Sept. 27, 1979.

Appeal from United States District Court, Eastern District of Texas; Joe J. Fisher, District Judge.

* * *

ON PETITION FOR REHEARING AND
PETITION FOR REHEARING
EN BANC.

(Opinion June 15, 1979, 5 Cir., 1979,
596 F.2d 1249).

Before BROWN, Chief Judge, COLEMAN, GODBOLD, CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE, KRAVITCH, JOHNSON, GARZA, HENDERSON, REAVLEY, POLITZ, HATCHETT, ANDERSON and RANDALL, Circuit Judges.*

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* Judges Goldberg and Ainsworth have recused themselves and did not participate in this decision.

BY THE COURT:

A member of the Court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the cause shall be reheard by the Court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

APPENDIX C

Panel Opinion of the United States Court of Appeals for the Fifth Circuit, Dated June 15, 1979

Wesley P. BERNARD, et al.,
Plaintiffs-Appellants,

v.

GULF OIL COMPANY, et al.,
Defendants-Appellees.

No. 77-1502.

United States Court of Appeals,
Fifth Circuit.

June 15, 1979.

* * *

Appeal from the United States District Court
For the Eastern District of Texas.

Before THORNBERRY, GODBOLD and HILL, Circuit Judges.

THORNBERRY, Circuit Judge:

Plaintiffs-appellants in this case are present or retired employees of defendant Gulf and claim that Gulf and the defendant unions have discriminated against plaintiffs and similarly situated black employees in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and the Civil Rights Act of 1866, 42 U.S.C. § 1981. The district court entered an order prohibiting the parties from communicating with class members and later granted defendants' motions for summary judgment.

Plaintiffs Bernard, Brown, and Johnson filed charges of discrimination with the EEOC in 1967 against Gulf and the local union.[1] The EEOC served copies of the charge on defendants in August, 1967, and issued a finding of reasonable cause in August, 1968. The EEOC actively pursued conciliation efforts with defendants until February, 1975, at which time it sent plaintiffs a notice stating that defendants did not wish to entertain conciliation discussions and advising plaintiffs that they could request a "Notice of Right to Sue" letter at any time.[2] The EEOC continued conciliation efforts on the basis of a Commissioner's charge filed in September 1967, which raised the same issues charged by plaintiffs. These efforts resulted

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1. Bernard also filed charges against the international union in 1976, but the EEOC dismissed this charge as untimely. Apparently, this was the only charge any of the plaintiffs filed against the international union. Although these facts may have some relevance to the merits of the action or scope of relief against the international union, the parties did not discuss that possibility before this court. Therefore, although the district court may decide differently after further examination on remand, on this appeal we will discuss the issues raised as if they were equally applicable to all defendants.

2. These first letters stated:
On February 19, 1975, the Equal Employment Opportunity Commission's Houston District Office received notice from Gulf Oil Company—U. S. and Oil, Chemical and Atomic Workers, International Union Local 4-23, the Respondents in the above captioned matter, that they do not wish to entertain conciliation discussions to resolve those issues set out under the Commission's Decision as issued on August 15, 1968. You are hereby notified that you may request a "Notice of Right to Sue" from this office at any time. If you so request, the notice will be issued, and you will have ninety (90) days from the date of its receipt to file suit in Federal District Court.

It is advisable that, fi you wish to pursue this matter further, you have an attorney ready to proceed with the case prior to issuance of the Notice of Right to Sue. If you do not have an attorney and you wish to proceed in Federal District Court with your case, then call this office for assistance in securing private legal counsel.

in a conciliation agreement between the EEOC and Gulf in April, 1976. Plaintiffs filed this suit in May, 1976, and requested the Right-to-Sue letters from the EEOC. The EEOC issued the letters to Bernard and Brown in June,[3] and plaintiffs amended their complaint to reflect this fact in July, 1976.

Soon after they filed the complaint, plaintiffs' attorneys appeared at a meeting of Gulf employees, during which they discussed this case. As a result of this meeting, Gulf requested the court to enter an order restricting the parties' or counsels' communication with class members. Gulf accompanied this request with an unsworn assertion that plaintiffs' attorneys had told the employees at the meeting it would be against their interest to accept the back pay award offered pursuant to the conciliation agreement. Plaintiffs' attorneys adamantly denied that they had urged the employees to reject the conciliation agreement. The court granted Gulf's motion without making any findings[4] Defendants then moved to dismiss the complaint. In November, 1976, the court ordered that the motion

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3. The Right-to-Sue letters stated:

NOTICE OF RIGHT TO SUE
WITHIN 90 DAYS

Pursuant to Section 706(f) of Title VII of the Civil Rights Act of 1964, as amended, you are hereby notified that you may, within ninety (90) days of receipt of this communication, institute a civil action in the appropriate Federal District Court. If you are unable to retain a lawyer, the Federal District Court, in its discretion, may appoint a lawyer to represent you and to authorize commencement of the suit without payment of fees, costs, or security. If you decide to institute suit and find you need assistance, you may take this notice, along with any correspondence you have received from the Commission, to the Clerk of the Federal District Court nearest to the place where the alleged discrimination occurred, and request that a Federal District Judge appoint counsel to represent you.

4. This order is set out in footnote 9, *infra*.

be treated as a motion for summary judgment, and granted summary judgment for defendants in January, 1977. Plaintiffs raise four issues on this appeal.

I.

[1] The district judge dismissed plaintiffs' Title VII claim because plaintiffs failed to file suit within 90 days of receiving the first letter, which stated that conciliation efforts had failed and that plaintiffs could request a Notice-of-Right-to-Sue letter. The judge held "that the 90 day period for filing suit begins when the notice of failure of conciliation is sent by the EEOC." Since the trial court opinion in this case, however, this court has held differently. In *Zambuto v. American Tel. & Tel. Co.*, 544 F.2d 1333 (5 Cir. 1977), a panel of this circuit noted that the statute imposing the 90 day limitation could be read to begin the 90 day period on receipt of a notice that the EEOC has either failed to file a civil action or has not arrived at a conciliation agreement. That court stated, however, that the limitations period does not begin to run until the EEOC has notified the claimant "of both the failure of conciliation and the EEOC's decision not to sue in order to indicate clearly that the administrative process has been completed." *Id.* at 1335. *Accord Turner v. Texas Instruments, Inc.*, 556 F.2d 1349 (5 Cir. 1977); *Page v. U. S. Indus., Inc.*, 556 F.2d 346 (5 Cir. 1977), *cert. denied*, 434 U.S. 1045, 98 S.Ct. 890, 54 L.Ed.2d 796 (1978). Furthermore, the *Zambuto* panel held that the final paragraph of the initial letter informed Mrs. Zambuto that "the EEOC was awaiting [her] request for issuance of a right-to-sue letter. Implicit in this latter statement is the assurance that the 90 day period would not commence until this letter was requested and dis-

patched. Because this paragraph declared that further administrative action was contemplated by EEOC, it failed to furnish Mrs. Zambuto (or AT&T) with the form of notice required under § 2000e-5(f)(1) to start the 90 day period for filing suit." 544 F.2d at 1335. Because the two-letter procedure allowed the claimant to postpone filing suit, the *Zambuto* panel declared the procedure invalid. Because the use and wording of the two letters was "patently misleading," however, that panel made its ruling prospective only.

[2] At oral argument, defendants conceded that the present case is directly controlled by *Zambuto* and the cases following it. Plaintiffs filed suit before the *Zambuto* decision, and the letters plaintiffs received are indistinguishable from those involved in *Zambuto, Page,* and *Turner.* As in *Turner* and *Page,* the first letter plaintiffs received informed them only that conciliation efforts had failed; it did not indicate that the EEOC had decided not to sue. Also, as in *Page* and *Zambuto,* the concluding paragraph of the first letter assured plaintiffs that the 90 day period would not commence until plaintiffs received the second letter. Because the letters to the plaintiffs in this case were as "patently misleading" as those in prior cases, the 90 day period for filing suit did not begin until receipt of the second letter. Plaintiffs filed suit within this period. Therefore, the district court erred in dismissing the individual Title VII claims of Bernard and Brown. Also, because the claims of these class representatives are properly before the court, the district court erred in dismissing the claass claims and the claims of the other named plaintiffs who did not file a complaint with the EEOC. *Wheeler v. American Home Prod.*, 563 F.2d 1233

(5 Cir. 1977); *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496 (5 Cir. 1968).

II.

The district judge also granted summary judgment in favor of defendants on plaintiffs' § 1981 claim. The trial judge found that plaintiffs' complaint alleged only "the identical pattern of discrimination which was the subject of the Bernard, Brown and Johnson EEOC complaint, which pattern has long since been eliminated." In addition, the court found as a fact that there were no continuing acts of discrimination.

[3-5] Defendants make two arguments in support of this holding. First, they assert that the trial court properly granted summary judgment in their favor because plaintiffs failed to respond properly to defendants' summary judgment motion. Plaintiffs assert that defendants have discriminated in the past and presently continue to discriminate against blacks in hiring, assignment, promotion, training, recruiting, discipline, and discharge. Defendants argue that "appellants wholly failed to offer factual support for their assertions." Defendants-appellees brief at 18. Defendants misunderstand the summary judgment practice. Under Fed. R. Civ. P. 56, the moving party has the initial burden of proving that there is no genuine issue of material fact. If the movant wishes to dispute the allegations of the complaint, he must do so through affidavits, documents, or other evidence. Unless and until the movant initially provides factual support for the summary judgment motion, the opposing party has no duty to respond to the motion or to present opposing evidence. *Boazman v. Economics Lab., Inc.*, 537 F.2d 210 (5 Cir. 1976). In the present case, defendants presented a great

number of affidavits with their summary judgment motion, but in none of the affidavits did defendants deny that they are discriminating against blacks. Therefore, the trial judge's ruling that there were no instances of continuing discrimination was unsupported by the summary judgment record. Defendants, as the parties requesting summary judgment, failed to meet their burden of showing the absence of any material issue of fact.

[6-8] Defendants also argue that even if the facts plaintiffs allege are true, we must dismiss plaintiffs' § 1981 claim. In support of this contention, defendants argue primarily that the applicable statute of limitations is that provided by Tex. Rev. Civ. Stat. Ann. art. 5526, *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1379 (5 Cir. 1974), and that under Texas law, the statute of limitations begins to run when the elements necessary for the cause of action first coalesce, regardless of whether defendants later commit other acts of the same nature. Under defendants' theory, the statute of limitations would have expired on plaintiffs' claim two years after defendants began discriminating against blacks, even if defendants continued such discrimination to the time plaintiffs filed this action. This argument is frivolous. Under both Texas and federal law, the relevant date for the purposes of the statute of limitations is the *last* date on which defendants improperly harmed plaintiffs. Furthermore, plaintiffs may collect damages for any wrongful acts defendants committed within the limitations period. *E.g.*, *Marlowe v. Fisher Body*, 489 F.2d 1057, 1063 (6 Cir. 1973); *Macklin v. Spector Freight Systems, Inc.*, 156 U.S. App. D.C. 69, 77, 478 F.2d 979, 987 (1973); *United States v. Georgia Power Co.*, 474 F.2d 906, 924 (5 Cir. 1973); *Alexander & Polley Const. Co. v. Spain*,

477 S.W.2d 301 (Tex. Civ. App.—Tyler 1972 no writ); *Goldman v. Ramsay,* 62 S.W.2d 176 (Tex. Civ. App.—Texarkana 1933 error dism'd). Defendants' reliance on *Kittrell v. City of Rockwall,* 526 F.2d 715 (5 Cir.), *cert. denied,* 426 U.S. 925, 96 S.Ct. 2636, 49 L.Ed.2d 379 (1976), is unfounded. That case turned on the rule, peculiar to trespass cases, that the statute of limitations begins to run on the date when the trespassers first entered the land, even if they continue to use the land after that date. *Baker v. City of Fort Worth,* 146 Tex. 600, 210 S.W.2d 564 (1948). This rule cannot be applied when defendants, as in this case, continue to violate plaintiffs' rights with new and distinct actions.

[9] Therefore, the district judge erred in holding that the statute of limitations totally barred plaintiffs' § 1981 claim. Plaintiffs' cause of action and any recovery they may receive, however, must be limited to those violations occurring within the two year period immediately preceding the filing of the complaint or thereafter.

III.

In addition to holding that statutes of limitations barred plaintiffs' claims, the district court "acknowledge[d] a most compelling argument for the equitable doctrine of laches in this particular case. . . ." Because we disagree with the court's ruling on the legal defenses, we find it necessary to discuss this alternative theory in support of the judgment below. *Lowe v. Pate Stevedoring Co.,* 558 F.2d 769, 770 n.2 (5 Cir. 1977).

[10] In *Franks v. Bowman Transp. Co.,* 495 F.2d 398, 406 (5 Cir. 1974), *rev'd on other grds,* 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976), this court held

that the doctrine of laches is applicable to Title VII and § 1981 actions brought by private plaintiffs, even if the legal limitations periods have not run. To apply laches in a particular case, the court must find both that the plaintiff delayed inexcusably in bringing the suit and that this delay unduly prejudiced defendants. *Save Our Wetlands, Inc. v. U.S. Army Corps of Engineers,* 549 F.2d 1021, 1026 (5 Cir.), *cert. denied,* 434 U.S. 836, 98 S.Ct. 126, 54 L.Ed.2d 98 (1977). We conclude that the evidence before the court on this summary judgment motion does not allow a finding that either of these elements exists.[5] Defendants argue that plaintiffs were aware of their cause of action at least as early as 1967 when they filed their initial charges against defendants with the EEOC. They also assert that plaintiffs could have requested a Notice of Right to Sue from the EEOC and filed a private action in 1970. 35 Fed. Reg. 10006 (June 18, 1970) (currently at 29 C.F.R. 1601.256 (1977)). Defendants therefore argue that plaintiffs' failure to file a complaint with the district court until 1976 "shows conclusively that they have slept on their rights." Defendants-appellees' brief at 28. The only justification plaintiffs offer for this nine-year delay in filing suit is their asserted right to await the completion of the EEOC administrative process. The issue before us, therefore, is whether plain-

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5. Which party has the burden of proof on the issues of laches is somewhat unclear. *See* G. Gilmore & C. Black, The Law of Admiralty 771-76 (2d ed. 1975); *Law v. Royal Palm Beach Colony,* 578 F.2d 98, 101 (5 Cir. 1978); *Wheat v. Hall,* 535 F.2d 874, 876 (5 Cir. 1976). The determination is complicated by the fact that the question has arisen most often in admiralty cases, which may not be entirely controlling in the present case. We find it unnecessary to decide this issue, however, because the facts as presented on this summary judgment motion, without more, do not allow a finding of laches.

tiffs' failure to file a private action until after the termination of the EEOC's active, continuing administrative process is unreasonable.

The Supreme Court in *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 97 S.Ct. 2447, 53 L.Ed.2d 402 (1977), discussed a similar issue. The employer-defendant in *Occidental Life* claimed that either federal or state statutes barred the EEOC from initiating suit more than three years after a claimant had filed a charge with the EEOC. In language particularly applicable to the present case, the Court indicated: "When Congress first enacted Title VII in 1964 it selected '[c]ooperation and voluntary compliance . . . as the preferred means for achieving' the goal of equality of employment opportunities." *Id.*, 97 S.Ct. at 2455. A legislative analysis of the 1972 amendments to Title VII is similar:

> It is hoped that recourse to the private lawsuit will be the exception and not the rule, and that the vast majority of complaints will be handled through the offices of the EEOC or the Attorney General, as appropriate. However, as the individual's right to redress are paramount under the provisions of Title VII it is necessary that all avenues be left open for quick and effective relief.

118 Cong. Rec. 7565 (1972).

[11, 12] These statements clearly indicate that the private remedy allowed by 42 U.S.C. § 2000e-5(f)(1) is only an alternative method for a plaintiff to obtain relief from discrimination. A plaintiff cannot be penalized for choosing to forgo this alternative and electing instead the legislatively and judicially favored method of relying on

the administrative processes of the EEOC.[6] We therefore hold that plaintiffs' failure to file their Title VII claim until completion of the EEOC process was not inexcusable delay and could not support the application of laches.

[13] Plaintiffs' § 1981 claim is in a slightly different posture. We have already decided that the state statute of limitations prevents plaintiffs from asserting claims arising more than two years before the filing of the complaint. Therefore, any delay occurring before that period is irrelevant to the § 1981 claim. Defendants have not alleged that plaintiffs delayed inexcusably in asserting the claims arising within those two years. Therefore, it is unnecessary for us to consider whether laches could be invoked to bar those claims arising within the legal limitations period.

[14, 15] We also conclude that, on the evidence presented, any prejudice suffered by defendants was caused not by plaintiffs' delay but by defendants' own actions. In the only affidavit supporting this element of defendants' summary judgment motion, the personnel director of Gulf indicated that since the date when plaintiffs allege the violations began, defendant Gulf has made several personnel changes, a number of management personnel have retired, and two personnel managers have deceased. These statements are insufficient grounds on which to base a finding of prejudice. The fact that there have been per-

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6. As stated in *Sangster v. United Air Lines*, 438 F.Supp. 1221 (N.D. Cal. 1977):

> Mrs. Sangster's reliance on the EEOC to conciliate her dispute with United cannot be characterized as lack of diligence on her part in view of the strong federal policy favoring such reliance. She cannot be found chargeable with neglect which would bar her right to bring this action when, trusting in the good offices and promise of her government to seek resolution of her complaint, she commits that grievance to its care.

sonnel changes or that employees have retired is irrelevant unless those employees are unavailable. *Akers v. State Marine Lines, Inc.*, 344 F.2d 217, 221 (5 Cir. 1965).

[16, 17] The affidavit does indicate that two former personnel managers have died and that those employees' knowledge is irreplaceable. Gulf asserts the live testimony of these employees is necessary, however, only because it has destroyed the written records of the personnel decisions made from 1965 through 1974. Defendants argue that they cannot now adequately defend against plaintiffs' charges without reference to these destroyed records. The EEOC informed defendants of the charges in 1967. Pursuant to its normal document retention plan, Gulf retained documents for only four years. Thus, Gulf did not destroy the documents relevant to the claims arising in 1965 until 1969, two years after Gulf learned of the charges. A party cannot assert the defense of laches merely because it has failed to preserve evidence despite knowledge of a pending claim. *American Marine Corp. v. Citizens Cas. Co.*, 447 F.2d 1328 (5 Cir. 1971).[7] This rule is of even greater

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7. The concluding statements of the Supreme Court in *Occidental Life* are again relevant:

> The absence of inflexible time limitations on the bringing of lawsuits will not, as the company asserts, deprive defendants in Title VII civil actions of fundamental fairness or subject them to the surprise and prejudice that can result from the prosecution of stale claims. Unlike the litigant in a private action who may first learn of the cause against him upon service of the complaint, the Title VII defendant is alerted to the possibility of an enforcement suit within 10 days after a charge has been filed. This prompt notice serves, as Congress intended, to give him an opportunity to gather and preserve evidence in anticipation of a court action.
>
> Moreover, during the pendency of EEOC administrative proceedings, a potential defendant is kept informed of the progress of the action. Regulations promulgated by the EEOC require that

validity in this case than in most. Since 1966, the EEOC has maintained a regulation prohibiting those charged with Title VII violations from destroying records relevant to the charge. 31 Fed. Reg. 2833 (Feb. 17, 1966) (currently at 29 C.F.R. 1602.14 (1977)). Therefore, defendants' argument that plaintiffs' delay prejudiced defendants is without merit. Insofar as defendants have been prejudiced, the evidence before the court shows that defendants' own negligence and disregard of EEOC regulations caused the prejudice.[8] We conclude that the present facts do not allow findings of either unreasonable delay or prejudice. Therefore the doctrine of laches is inapplicable.

IV.

[18] Because we are remanding this case for further action, it is necessary that we consider the propriety of an order the district judge entered restricting the parties' communication with the members of the putative class. Judge Steger, in Chief Judge Fisher's absence, originally entered an order generally prohibiting all communication without exception. Chief Judge Fisher later modified the order. It is of this later order that plaintiffs complain on appeal. The modified order was explicitly modeled on those suggested by the Federal Judicial Center in the

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the charged party be promptly notified when a determination of reasonable cause has been made, 29 CFR § 1601.19b(b), and when the EEOC has terminated its efforts to conciliate a dispute, *id.*, §§ 1601.23, 1601.25.

97 S.Ct. at 2458.

8. Defendants admit that plaintiffs' § 1981 claims are nearly identical to their Title VII claims. Defendants could therefore disprove the claims with the same evidence. Since the EEOC regulations required defendants to maintain all records relevant to the Title VII claims, defendants could not have been prejudiced with respect to either Title VII or § 1981.

Manual for Complex Litigation, Part 2, § 1.41 (1977).[9]

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9. The order provided:
IT IS ORDERED:
(1) That Gulf's motion to modify Judge Steger's Order dated May 28, 1976 is granted;
(2) That Judge Steger's Order dated May 28, 1976 be modified so as to read as follows:
In this action, all parties hereto and their counsel are forbidden directly or indirectly, orally or in writing, to communicate concerning such action with any potential or actual class member not a formal party to the action without the consent and approval of the proposed communication and proposed addressees by order of this Court. Any such proposed communication shall be presented to this Court in writing with a designation of or description of all addressees and with a motion and proposed order for prior approval by this Court of the proposed communication. The communications forbidden by this order include, but are not limited to, (a) solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action; (c) solicitation by formal parties to the class action of requests by class members to opt out in class actions under subparagraph (b)(3) of Rule 23, F.R. Civ. P., and (d) communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the class action, and of any actual or potential Court orders therein which may create impressions tending, without cause, to reflect adversely on any party, any counsel, this Court, or the administration of justice. The obligations and prohibitions of this order are not exclusive. All other ethical, legal and equitable obligations are unaffected by this order.
This order does not forbid (1) communications between an attorney and his client or a prospective client, who has on the initiative of the client or prospective client consulted with, employed or proposed to employ the attorney, or (2) communications occurring in the regular course of business or in the performance of the duties of a public office or agency (such as the Attorney General) which do not have the effect of soliciting representation by counsel, or misrepresenting the status, purposes or effect of the action and orders therein.
If any party or counsel for a party asserts a constitutional right to communicate with any member of the class without prior restraint and does so communicate pursuant to that asserted right, he shall within five days after such communication file with the Court a copy of such communication, if in writing, or an accurate and substantially complete summary of the communication if oral.

Plaintiffs argue that the order was improper for several

(3) That Gulf be allowed to proceed with the payment of back pay awards and the obtaining of receipts and releases from those employees covered by the Conciliation Agreement dated April 14, 1976, between Gulf, the U. S. Equal Employment Opportunity Commission and the Office for Equal Opportunity, U. S. Department of the Interior; That the private settlement of charges that the employer has violated Title VII is to be encouraged, *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1684, 48 L.Ed.2d 187 (1976).

(4) That the Clerk of the Court mail a notice to all employees of Gulf at its Port Arthur Refinery who are covered by the Conciliation Agreement and who have not signed receipts and releases for back pay awards informing them that they have 45 days from the date of the Clerk's notice to accept the offer as provided for by the Conciliation Agreement or such offer will expire until further order of the Court;

(5) That the contents of the notice be the same as that set out in Appendix 1;

(6) That Gulf bear the expense of mailing the notice and a copy of the Court's order to the individuals covered by item (4) above;

(7) That all employees who have delivered receipts and releases to Gulf on or before 55 days from the date of the Clerk's notice shall be deemed to have accepted the offer as contained in the Conciliation Agreement;

(8) That any further communication, either direct or indirect, oral or in writing (other than those permitted pursuant to paragraph (2) above) from the named parties, their representatives or counsel to the potential or actual class members not formal parties to this action is forbidden;

(9) That Gulf inform the Court 65 days from the date of the Clerk's notice to be sent by the Clerk of the Court of the names of potential or actual class members who have accepted the offer of back pay and signed receipts and releases pursuant to the Conciliation Agreement and the names of those who have refused or failed to respond.

It is Plaintiff's contention that any such provisions as hereinbefore stated that limit communication with potential class members are constitutionally invalid, citing *Rodgers v. United States Steel Corporation*, 508 F.2d 152 (3rd Cir. 1975), *cert. denied*, 420 U.S. 969, 95 S.Ct. 1386, 43 L.Ed.2d 649 (1975). This Court finds that the *Rodgers* case is inapplicable, and that this order comports with the requisites set out in the *Manual for Complex Litigation*, Section 1.41, p. 106 CCH Edition 1973, which specifically exempts constitutionally protected communication when the substance of such communication is filed with the Court.

reasons. First, they assert that it is inconsistent with the policies of Rule 23 of the Federal Rules of Civil Procedure and therefore beyond the powers of the district court. We reject that argument and hold that the order was a permissible exercise of the trial court's discretionary power in controlling a class action.

As one noted treatise states:

> Because class actions tend to be extremely complicated and protracted, their management and disposition frequently require the exercise of considerable judicial control and ingenuity in the framing of orders relating to various aspects of the case. Rule 23 (d) provides the trial court with extensive discretion in achieving this objective and offers some guidance as to the types of problems the district judge is likely to encounter.

7A C. Wright & A. Miller, Federal Practice & Procedure § 1791 at 193 (1972).[10]

[19-21] We believe the trial judge could have easily concluded that his interest in and duty of controlling the suit in this manner outweighed any interest plaintiffs' attorneys may have in communicating with members of the putative class without the prior approval of the court. Rule 23 imposes on the trial judge the duty of assuring that a class action is an appropriate way to resolve the controversy, the representative parties will fairly and adequately protect the interests of the class, the pleading and trial of the case is conducted fairly and efficiently, and

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10. *See In Re Air Crash Disaster at Florida Everglades*, 549 F.2d 1006, 1012 n. 8 (5 Cir. 1977): "In class actions we recognize, indeed insist upon, the court's participation as the manager of the case."

any settlement or compromise is not unfavorable to the class.[11] The present order could be helpful in exercising many of these duties, especially those of assuring fairness and efficiency. Any communication between the parties and class members may mislead the class members by appearing to reflect the opinion of the court rather than that of the party making the communication. This danger exists "simply because of references to the title of the court, the style of the action, the name of the judge, and to official processes." Manual for Complex Litigation, Part 1, § 1.41 at 27 (C. Wright & A. Miller ed. 1977). The trial court should therefore have the power to examine any communication in order to assure that class members will not be misled in this manner. Even apart from any references to the court, communications to potential class members by the parties may unfairly represent facts or issues relevant to the action. When those communications are sent during a limited period in which class members may opt out of the class, or, as here, in which they may accept a back pay offer pursuant to a conciliation agreement, any misleading statement may be irreparable. The trial judge may also believe that requiring prior approval of communications will reduce the risk of the class members becoming confused by an avalanche of notices, inquiries, and arguments directed to them by each of the parties to this action. Thus, there are many substantial reasons a trial judge may believe that an order

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11. Thus, although in the ordinary non-class suit, restrictions such as those in the present case might be entered in the form of a temporary injunction and only after relatively strict scrutiny of specific criteria, the drafters of the Rules felt that the trial judge needed broader powers with respect to class actions and specially imbued the district court with more extensive authority to control the suit.

such as that suggested in the Manual for Complex Litigation is justified.[12]

Plaintiffs assert their interests outweigh these concerns of the trial judge. Plaintiffs argue that to conduct the action adequately they must be allowed to contact class members in order both to discover their case and to inform class members of their civil rights. They allege that the order prevents them from performing those functions. This is not true; the order only prohibits contact with class members without prior approval of the court. Therefore, only plaintiffs' interest in *unrestrained* communications is to be balanced against the court's interests in requiring court approval of all communications sent to class members.

[22-24] Plaintiffs' ability to discover their case is in no way reduced by the requirement that the court approve any contact. It is expected that the trial judge will exercise "minimal judicial control of these communications. . . ." and freely allow discovery. Manual for Complex Litigation, Part 1, § 1.41 at 29 (C. Wright & A. Miller ed. 1977). The trial judge should refuse to allow only those attempts at discovery that would clearly affect the fairness or efficiency of the litigation adversely. Plaintiffs have not shown that this "minimal control" would prejudice them in any way. Therefore, we do not believe

12. The Manual enumerates other potential abuses that may justify the use of such an order, for example: solicitation of direct legal representation of potential and actual class members who are not formal parties to the class action; and solicitation of funds and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action. Arguably these concerns are not significant in this case in which the potential class is represented by a non-profit organization whose fees are not paid directly by the class members.

plaintiffs have any significant interest in seeking discovery without the prior approval of the court. Similarly, to the extent that Rule 23 implicitly provides plaintiffs with a right to "encourag[e] common participation in the litigation of [plaintiffs' race] discrimination claim," *Coles v. Marsh,* 560 F.2d 186, 189 (3 Cir.), *cert. denied sub nom., Blue Cross v. Marsh,* 434 U.S. 985, 98 S.Ct. 611, 54 L. Ed.2d 479 (1977), that same rule's explicit grant of authority to the trial court to control the conduct and settlement of the action outweighs plaintiffs' right. Therefore, although there may be other methods of achieving similar results,[13] Rule 23 does not prohibit a trial court's discretionary use of an order requiring prior approval of communications with class members.[14]

[25] Plaintiffs next argue that the order is an unconstitutional prior restraint on their communication with the class and is especially egregious in this case in which plaintiffs are represented by an organization highly regarded as an effective opponent of discrimination. This argument is considered and rejected in the recent revision of the Manual for Complex Litigation, Part 1, § 1.41 at

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13. *Compare* Developments in the Law-Class Actions, 89 Harv. L. Rev. 1281, 1601-04 (1976), *with Waldo v. Lakeshore Estates, Inc.,* 433 F.Supp. 782, 792 n. 10 (E.D. La. 1977).

14. Because the trial judge made no findings of fact concerning plaintiffs' attorneys' alleged improprieties, the allegations are irrelevant to our decision. We hold that the trial judge had the power to restrict communications without regard to any allegations of unethical conduct. This holding is necessary because many of the dangers of abuse and irreparable harm discussed above can arise without warning. Requiring the district court to find specific evidence of the dangers in a particular case before acting would severely hamper its ability to control the case. In many instances, the abuses must not merely be punished, but must be prevented. This can be accomplished only if the trial judge can order the restrictions before the abuses have materialized.

1-3 (C. Wright & A. Miller ed. 1978 Cum. Supp.) and in *Waldo v. Lakeshore Estates, Inc.*, 433 F.Supp. 782 (E.D. La. 1977). We find it unnecessary, however, to decide whether the interests discussed above would also justify the prior restraint of any constitutionally protected communication. The order in the present case, unlike those in *Rodgers v. United States Steel Corp.*, 508 F.2d 152 (3 Cir.), *cert. denied*, 423 U.S. 832, 96 S.Ct. 54, 46 L.Ed.2d 50 (1975), *Waldo* or the Manual, explicitly exempts communications that a party or counsel asserts are constitutionally protected from prior restraint.

[26] Despite this provision, plaintiffs argue that the order chills their free exercise of protected activities because they can never be certain that the district court will agree with their assertion that the communication is protected.[15] As an example of such a disagreement, plaintiffs rely on an incident in the trial court. Plaintiffs submitted a document to the court for approval asserting that it was constitutionally protected. The judge refused to allow plaintiffs to send the document to the class members. Plaintiffs argue that if they had sent the document without submitting it they may have been subject to a contempt order. This argument is without merit. The exemption applies when the parties make any communication they *assert* is protected, not merely when the trial judge agrees with that assertion. Thus, as long as a party or counsel makes any unapproved contact with class members in the good faith belief that the contact is constitutionally shielded, he may not be punished for violating

15. *See* Note, 88 Harv. L. Rev. 1911, 1922 n. 74 (1975): The "proviso exempting constitutionally-protected communication does not eliminate—indeed it highlights—the overbreadth and resultant chilling effect of the Manual's proposed rule."

the court's order. Once plaintiffs submitted the proposed communication to the district judge, however, the exemption for communications they asserted were constitutionally protected was no longer relevant. At that point the issue became whether the Constitution, in fact, protected the communication rather than whether the plaintiffs had distributed it in the good faith belief that it was constitutionally protected. Plaintiffs have not argued on appeal that the trial judge erred in deciding that he could properly prohibit the distribution of that particular document nor have they alleged his determination was untimely. They have alluded to the incident only as an example of the alleged "chill" the order prohibiting unapproved communication placed on the exercise of their first amendment rights, notwithstanding the exception for communications they asserted to be constitutionally protected. Therefore, we need not decide whether the judge properly prohibited dissemination of this particular notice after plaintiffs submitted it for his approval. We note, however, that even though the prohibition on unapproved communications is permissible, the judge's separate decisions approving or disapproving particular communications would normally be proper subjects for appellate review.

[27] We conclude that the present order adequately safeguards the first amendment rights of the parties and counsel because even if the prohibitions of the order are vague or overbroad, the parties can avoid them if they assert a good faith belief that a particular communication is constitutionally protected. *Cf. Screws v. United States,* 325 U.S. 91, 101-02, 65 S.Ct. 1031, 1035-36, 89 L.Ed. 1495 (1945): "the requirement of specific intent to do a prohibited act may avoid those consequences to the

accused which may otherwise render a vague or indefinite statute invalid."

[28] Plaintiffs' final contention is that the order violates their right to equal protection of the laws. This claim is based on the assertion that the order allows defendants to offer back pay settlements to the class members and to contact class members in the ordinary course of defendants' business without allowing plaintiffs similar rights. This argument is invalid because it is based on an incorrect reading of the order. The order prohibits defendants as well as plaintiffs from contacting the class members regarding back pay settlements. Rather than allowing further contact by either party, it directs the court clerk to distribute a notice to class members informing them that they have 45 days within which to accept the back pay award to which they are entitled under the conciliation agreement negotiated by the EEOC and directs them not to accept the award if they wish to participate in any recovery secured by plaintiffs in this action. Further, the provision allowing communication with class members in the regular course of business applies equally to all parties and counsel, not merely to defendants. It could be argued that allowing contact in the regular course of business would tend to favor defendants in practice because of their greater day-to-day contact with the employees. Any management discussion of the merits of the suit with class members, however, would not be in the regular course of business. Therefore, although defendants may have greater day-to-day contact with the class members, the order does not allow defendants any greater freedom than plaintiffs in discussing the suit with class members.

We therefore conclude that the district court's order of June 22, 1976, is a permissible exercise of the court's

power to control class action litigation and is prohibited by neither the first nor fifth amendments to the Constitution.

The judgment of the district court is REVERSED and the case REMANDED for proceedings consistent with this opinion.

GODBOLD, Circuit Judge, concurring in part and dissenting in part:

I concur in Parts I through III of the majority opinion. I dissent from Part IV, which upholds the validity of the district court's order restricting communications by named parties and their counsel with any actual or potential class member not a formal party.

The issue is important. The critical part of the order in question follows the form suggested in the Manual for Complex Litigation, 1977 ed., Pt. 2, § 1.41.[1] This case presents in this circuit for the first time the validity of such an order. Another circuit has taken a position contrary to the majority's decision.[2]

In other cases I have vigorously asserted the power of the district court to manage class actions and other complex cases.[3] But, in my opinion, the restraints imposed

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1. Sample Pretrial Order No. 15. The suggested form is a reprint of a pretrial order entered by the District Court for the Western District of Missouri. *Manual*, Pt. 2, § 1.41 n. 33.

2. *Coles v. Marsh*, 560 F.2d 186 (C.A. 3), *cert. denied*, 434 U.S. 985, 98 S.Ct. 611, 54 L.Ed.2d 479 (1977). *See also Rodgers v. United States Steel Corp.*, 508 F.2d 152 (C.A. 3), *cert. denied*, 423 U.S. 832, 96 S.Ct. 54, 46 L.Ed.2d 50 (1975).

3. *In re Air Crash Disaster at Florida Everglades*, 549 F.2d 1006, 1012 & n. 8 (C.A. 5, 1977); *Huff v. N. D. Cass Co.*, 485 F.2d 710, 712-13 (C.A. 5, 1973) (en banc).

in this case contravene Rule 23, F. R. Civ. P., and violate freedom of speech and freedom of association as guaranteed by our Constitution.

I. *The history*

Understanding the issues requires a more complete history than the brief statement made by the majority. In April 1976 Gulf and EEOC entered into a conciliation agreement covering alleged racial discrimination by Gulf against black employees at its Port Arthur, Texas plant, pursuant to which Gulf agreed to cease alleged discriminatory practices, establish an affirmative action program, and offer back pay to alleged discriminatees, ranging, for various employees and various periods, between $2.81 per month of service and $5.62 per month of service. The affected employees were not parties to the agreement. Gulf agreed to notify affected employees of the back pay agreed upon; failure of the employee to respond would be regarded as acceptance. According to Gulf, back pay was offered to 614 present and former black employees of the Port Arthur plant.[4]

In May 1976, while implementation of the conciliation agreement was in progress, six present or retired black employees of the Port Arthur plant brought this class suit, under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981, on behalf of black employees, black former employees of the plant, and black applicants rejected for employment with Gulf Oil Company (not limited to the Port Arthur plant). Plaintiffs were represented by Stella Morrison, of Port Arthur, Charles E. Cotton, of New Orleans, and three New York attorneys from the NAACP

4. And 29 female employees.

Legal Defense and Education Fund, Jack Greenberg, Barry L. Goldstein and Ulysses Gene Thibodeaux. Plaintiffs asked injunctive and declaratory relief and damages. The defendants are Gulf and the Oil, Chemical and Atomic Workers' Union. Plaintiffs charged that Gulf discriminated against blacks in hiring and job assignments, employed discriminatory tests, paid unequal pay, employed racially tainted promotion and progression practices, denied training to blacks, refused seniority to blacks, and discriminatorily discharged and disciplined blacks. They alleged that the union had agreed to, acquisced in or condoned Gulf's discriminatory practices.

According to affidavits later filed by plaintiffs' counsel a meeting of black employees who were members of the alleged class was held May 22 at the request of the named plaintiffs, plaintiffs' counsel were invited to attend, and some did attend. Gulf was served with process May 24. On May 27, before Gulf filed responsive pleadings, it filed a two-sentence, unsworn request that the court enter an order limiting communications by parties and their counsel with actual or potential class members. The motion was accompanied by an unsworn brief asserting that Ulysses Gene Thibodeaux, one of plaintiffs' attorneys, had recommended to actual and potential class members at a meeting that they not sign receipts and releases sent them pursuant to the conciliation agreement. Further, the brief said that it had been reported to Gulf that Thibodeaux advised the group that they should mail back to Gulf checks received pursuant to the conciliation agreement because he could recover twice as much for them by the pending suit. Gulf asserted in its brief that these actions violated standards imposed on attorneys by law and by the Canons of Ethics. It asserted that an order of

the court was necessary to prevent further communication of the type alleged and that the statements by plaintiffs' attorney would prejudice its defense of the case and the conciliation efforts. In its brief Gulf said that when the summons was served on it approximately 452 of the 643 employees entitled to back pay had received checks and executed general releases.

On May 28, after oral argument by the parties, District Judge Steger entered a temporary order effective until Chief Judge Fisher could return and assume control and administration of the case. His order is substantially the same as paragraph 2 of the modified order, which appears as note 9 of the majority opinion, that is, it contained the restraints without the exceptions. Judge Steger made no findings.

On June 8, Gulf filed an unverified motion to modify the temporary order to permit it to resume offering back pay awards and to receive receipts and releases, as provided by the conciliation agreement. Gulf added, again by an unsworn brief attached to its motion, a new allegation of misconduct by saying that it had been reported to Gulf that Thibodeaux had recommended to the persons at the meeting that even if an employee had signed a receipt and release he should return his check to Gulf. Gulf also filed an affidavit from EEOC stating that it felt the issues in this suit were "almost identical" to those embraced by the conciliation agreement.

Plaintiffs filed an unsworn responsive brief, squarely raising the constitutionality of the order and the district court's authority to issue it. Judge Fisher conducted a hearing on June 10 and allowed time for additional briefs. With their next brief plaintiffs filed affidavits by Thibo-

deaux, Morrison and Goldstein, covering several points. Thibodeaux denied that he advised potential class members not to accept Gulf's offer of settlement and denied that he stated that plaintiffs' counsel could get employees twice as much back pay by suit. According to the affidavits, none of the lawyers accepted or expected compensation from the named plaintiffs or any additional named plaintiffs or from members of the class; the only anticipated compensation was by attorneys' fees awarded by the court against the defendants, and in the case of the LDF attorneys any fees awarded them would be paid over to LDF. The affidavits also set out that it was necessary for plaintiffs and their counsel to communicate with members of the proposed class to investigate systematic and individual racial discrimination, complete discovery, and define issues in the case, and that, because of the back pay offers made by Gulf under the conciliation agreement, it was of crucial importance that plaintiffs' attorneys be able to inform class members of their rights and answer their questions and concerns. In their brief, plaintiffs asserted that many of the issues (specifying several of them) encompassed by the suit were not included within the matters covered by the conciliation agreement.

On June 22, without requiring Gulf to verify its charges of improper and unethical conduct by Thibodeaux, and without making findings of fact, Judge Fisher entered the modified order. He rejected plaintiffs' contention that the order was constitutionally invalid.

I turn to the contents of the modified order. Its opening language is plenary in form. I discuss below the exceptions that appear further on in the order.

The persons enjoined are "all parties hereto and their counsel."[5]

The subject matter forbidden is communications "concerning [this] action . . . without the consent and approval of the proposed communication and proposed addressees by order of this court." More specific communications which the proscription includes, but is not limited to, are: (a) solicitation of legal representation of potential and actual class members not formal parties; (b) solicitation of fees and expenses; (c) solicitation of requests by class members to opt out; (d) "communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the class action, and of any actual or potential Court orders therein which may create impressions tending, without cause, to reflect adversely on any party, any counsel, this Court, or the administration of justice."

The means of communication forbidden are "directly or indirectly, orally or in writing."

The persons with whom communication is forbidden are potential and actual class members.

The second subparagraph of ¶(2) sets out exceptions as provided in the *Manual's* suggested form: communications between attorney and client, and attorney and prospective client when initiated by the prospective client, and communications in the regular course of business. The third subparagraph of ¶(2) is the "constitutional right" exception:

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5. The majority refer several times to the order's restricting communication *by the parties*. Elsewhere they refer to the interests of *plaintiffs' attorneys* in communicating with putative class members. The order bars both named parties and counsel.

If any party or counsel for a party asserts a constitutional right to communicate with any member of the class without prior restraint and does so communicate pursuant to that asserted right, he shall within five days after such communication file with the Court a copy of such communication, if in writing, or an accurate and substantially complete summary of the communication if oral.

In the modified order Judge Fisher added to the *Manual's* proposed form a provision that the clerk mail a notice to employees covered by the conciliation agreement stating that they had 45 days in which to accept Gulf's offer and that all who delivered receipts and releases within 55 days would be deemed to have accepted. See ¶(4) and ¶(9) of the order. In ¶(8) the court restated the restraints on communication that it had imposed in the earlier part of the order.

On July 6, pursuant to the "constitutional right" exception, plaintiffs moved for permission for themselves and their counsel to communicate with members of the proposed class. They attached the following notice which they proposed to distribute and asserted that they were constitutionally entitled to distribute it:

Illustration to follow.

C-30

ATTENTION
BLACK WORKERS
OF GULF OIL.

The Company has asked you to sign a release. If you do, you may be giving up very important civil rights. It is important that you fully understand what you are getting in return for the release. *IT IS IMPORTANT THAT YOU TALK TO A LAWYER BEFORE YOU SIGN.* These lawyers will talk to you *FOR FREE.*

STELLA M. MORRISON
440 Austin Avenue
Room 516
Port Arthur, Texas 77640
(713) 985-9358

BARRY L. GOLDSTEIN
ULYSSES GENE THIBODEAUX
10 Columbus Circle
Suite 2030
New York, New York 10019
(212) 586-8397

CHARLES E. COTTON
348 Baronne Street
Suite 500
New Orleans, Louisiana 70112
(504) 522-2133

These lawyers represent six of your fellow workers in a lawsuit titled *Bernard v. Gulf Oil Co.*, which was filed in Beaumont Federal Court on behalf of all of you. This suit seeks to correct fully the alleged discriminatory practices of Gulf.

Even if you have already signed the release, talk to a lawyer. You may consult another attorney. If necessary, have him contact the above-named lawyers for more details. All discussions will be kept strictly confidential.

AGAIN, IT IS IMPORTANT THAT YOU TALK TO A LAWYER. Whatever your decision might be, we will continue to vigorously prosecute this lawsuit in order to correct all the alleged discriminatory practices at Gulf Oil.

Plaintifls alleged in their motion that neither Gulf's offer to employees nor the notice sent by the clerk explained the terms of the conciliation agreement. They asked the court to declare that the notice was constitutionally protected. They noted that under the "constitutional right" exception to the order they were entitled to distribute the notice and file it with the court within five days thereafter. However, because of what they considered to be the vagueness of the order, and "for reasons of prudence," the plaintiffs asked for the court's guidance. Their reasons for asking guidance were not unreasonable. The first subparagraph of ¶ (2) of the order required that *any* proposed communication be presented in writing for prior approval. Paragraph (3) restated all the restraints. The "constitutional right" exception appeared to permit retrospective filing in place of prior court approval. But counsel already charged with unethical and illegal conduct cannot be faulted for electing not to gamble on their interpretation of the order or upon the possibility that if they sent the notice without preclearance the court might find it not constitutionally protected and their assertion of constitutional protection not made

in good faith.[6] As it turned out, their prudence was justified because the court ultimately denied permission to send the notice.

The request for guidance from the court, filed July 6, was appropriate and respectful, and it deserved timely court action. To be effective the notice that plaintiffs proposed to send needed to be distributed promptly. The 45 days for acceptance of Gulf's offer, described in the Clerk's notice, expired on or about August 8. The court did not act on plaintiffs' motion until August 10, when it denied the motion by a one-sentence order without explanation.

II. Misuse of discretion

I believe that the court misused its discretion in entering the order in thise case.[7]

(1) Non-compliance with Rule 23(d)

Rule 23(d) gives the following authority to the court:

> In the conduct of actions to which this rule applies, the court may make appropriate orders: . . . (3) imposing conditions on the representative parties. (Emphasis added.)

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6. *See Rodgers v. United States Steel,* 508 F.2d 152, 161 (CA3), *cert. denied,* 423 U.S. 832, 96 S.Ct. 54, 46 L.Ed.2d 50 (1975): "The attorneys for the plaintiffs, with appropriate caution, declined to test an ambiguous order by violating it and risking contempt."

7. The district court had not adopted a local rule concerning limiting communications in class actions. We are, therefore, not concerned with rule-making power but with the authority of the court inherent or conferred by Congress through the Rules, to impose the limit on communications. The *Manual,* Pt. 2, § 1.41, contains a suggested local rule, an earlier version of which was held invalid in *Rodgers v. United States Steel, supra.*

This provision, added in 1966, gives the trial court "extensive power" to control the conduct of a class action. 7A C. Wright & A. Miller, Federal Practice and procedure § 1791 (1972). There will be situations in which it will be "appropriate" for the court to restrict commuications between counsel and potential class members. But, however, broad "appropriate" may be it is certainly no broader than the limits imposed by the Constitution, as discussed in Part III, below. Pretermitting constitutional limits, it seems to me that the district court must find that restrictions are "appropriate" upon a factual showing by the moving party that unsupervised communications between counsel and named plaintiffs on one hand and potential class members on the other have materialized into actual abuses of the class action device or that abuses are imminently threatened.[8] In this case, "appropriateness" was not proved and no finding of "appropriateness" was made by either district judge.

The only arguable grounds I perceive for the order's being "appropriate" are the unsworn statements by Gulf that were denied by plaintiffs' attorney under oath, the discussions in the *Manual* of possible abuses of class actions, and the existence of the conciliation agreement in the process of implementation.

With respect to the presence of plaintiffs' counsel at the meeting of employees, it seems to me singularly inappropriate for the district court to rely—if it did rely—

8. The Third Circuit in *Coles v. Marsh,* 560 F.2d 186, 189 (CA3), *cert. denied,* 434 U.S. 985, 98 S.Ct. 611, 54 L.Ed.2d 479 (1977), discussed the validity of a similar order restraining communications in terms of the district court's power and held it invalid. Although I reach the same result as the *Coles* court, I think it is preferable to analyze the question in terms of the district court's discretion.

upon Gulf's representations that Thibodeaux made statements which violated both the law and the Canons of Ethics. Gulf never presented proof of this hearsay. Under oath, Thibodeaux denied making such statements.[9]

Nor should a judicial decision on "appropriateness" be rested upon the discussions in the *Manual*. With deference to the opinions of the distinguished Board of Editors concerning the possibility of abuses in class actions, a trial court should not merely presume that in the case before it—indeed in all class actions coming before it—abuses are either present or threatened.[10]

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9. In this appeal Gulf restates the hearsay as though it were fact proved and found. Also it throws in this alternative argument:

> By affidavit, one of the Appellants' attorneys admits to attending the discussions, but denies making any improper statements. Whether the statements, in fact, are true is immaterial since the admitted appearance by Appellants' attorneys at such a meeting provides the potential for abuse of the class action process which the Manual and Rule 23 seeks to prevent.

Br. p. 42. Counsel for Gulf treat more lightly charging an attorney with unethical and improper conduct than I would be willing to do.

10. The *Manual* cites *Weight Watchers of Philadelphia v. Weight Watchers International, Inc.*, 455 F.2d 770 (CA2, 1972), as confirming an "almost unreviewable discretion" in trial courts to regulate communications between counsel and active and poten ial class members. *Weight Watchers* rests upon the unreviewability of discretionary orders by mandamus. The issue is before us by appeal. In *Rodgers*, the Third Circuit said:

> [T]he committee which drafted the *Manual* probably went too far in its apparent assumption that *Craig v. Harney*, [331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed. 1546 (1947)] and *Bridges v. California*, [314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192 (1941)] would permit the vesting of unreviewable discretion in a district court to impose a prior restraint on communication or association. I J. Moore, [Federal Practice ¶ 1.41, at 29 n. 28, (2d ed. 1974, Part 2)].

508 F.2d at 165. *Rodgers* granted mandamus against use of a local rule then appearing in the *Manual* and since amended. I discuss in Part III, below, the constitutional limitations imposed by *Craig v. Harney* and *Bridges v. California*.

The order in this case was entered pursuant to the authority given the district court under Rule 23(d). That rule requires the district judge to exercise his discretion in making orders. He is only authorized to make "appropriate orders," and a determination of what is appropriate requires the exercise of discretion. What is appropriate for one case is inappropriate in another. If communications between counsel and actual and potential members of a class action were always abusive of the class action device then it would be appropriate to automatically enter an order restricting communications. Such communications, however, in many instances serve to effectuate the "purposes of Rule 23 by encouraging common participation in [a lawsuit]." *Coles v. Marsh, supra* at 189. The decision whether to restrict communications in a particular case, therefore, requires an inquiry into the likelihood of abuse and the potential for benefits. The *Manual's* general discussion of potential abuses flowing from unrestrained communications is no substitute for reasoned inquiry into the harms and benefits on the particular facts of each case. The rule requires no less.[11]

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11. In *Waldo v. Lakeshore Estates, Inc.*, 433 F.Supp. 782 (E.D. La., 1977), the district court rejected the claim that it exceeded its rule-making authority under Rule 83 by adopting its Local Rule 2.12(e), identical to the *Manual's* suggested Rule. The court concluded that "[t]he potential abuses attendant upon . . . unregulated communication clearly undermine the efficacy of the class action device." *Id.* at 794. The local rule was, therefore, consistent with the Federal Rules of Civil Procedure, the standard for judging the validity of a local rule. The difficulty with the district court's analysis is that Rule 2.12(e) applies to every case. It does not permit the district judge in an individual case the discretion to not restrict communications, although in some cases it would be inconsistent with the policies of the Federal Rules to restrict communication. A refined approach that does not sweep so broadly that it does away with the benefits of attorney-client contact and recognizes the interests that putative class members have in receiving communications is called for.

Here, at the appellate level, the majority grounds its decision on possibilities rather than actualities. It refers to what the parties "may do," to what the trial judge "could have easily concluded," how the order "could be helpful" to the judge in exercising his Rule 23 duties, to what the judge "may believe" and of how communications "may mislead." This is not the stuff of which judicial decisions are made.

The final potential justification for the court's order is the strong emphasis upon settlement of Title VII disputes by conciliation rather than in the courtroom. *U.S. v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 846 (CA5, 1975). But, as we noted in *Allegheny-Ludlum*,

> the "final responsibility for enforcement of Title VII is vested with federal courts," . . . [T]he various legal remedies for employment discrimination are cumulative and complementary. From the grievant's standpoint, "[u]nder some circumstances, the administrative route may be highly preferred over the litigatory; under others the reverse may be true."

Id. at 848 & n.26 (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44, 94 S.Ct. 1011, 1017, 39 L.Ed.2d 147, 156 (1974), and *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 461, 95 S.Ct. 1716, 1720,

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The need for such an approach was recognized by District Judge Bue in his report accompanying the Southern District of Texas' amendments to its local rule restricting communications, discussed *infra*. Judge Bue's discussion focuses primarily on constitutional problems with the *Manual's* rule. A similar need for a narrow rule that successfully guards against abuses while not doing away with the benefits of communication is also required so that it does not run afoul of Rule 83's mandate that district courts adopt only local rules that are consistent with the policies of the Federal Rules.

44 L.Ed.2d 295, 302 (1975)). In *Rodriguez v. East Texas Motor Freight,* 505 F.2d 40 (CA5, 1974), *vacated on other grounds,* 431 U.S. 395, 97 S.Ct. 1891, 52 L.Ed. 2d 453 (1977), we commented on the possible divergence of governmental interests in remedying employment discrimination and the interests of the individuals who were the victims of discrimination:

> While the Government may be willing to compromise in order to gain prompt, and perhaps nationwide, relief, private plaintiffs, more concerned with full compensation for class members, may be willing to hold out for full restitution.

Id. at 66. The choice between the lawsuit and accepting Gulf's back pay offer and giving a general release was for each black employee to make. The court could not make it for him, nor should it freight his choice with restrictions that were not "appropriate" under the circumstances. Gulf had represented to the court that the conciliation agreement was fair and embraced substantially the same issues as the suit. But plaintiffs' counsel had represented that the conciliation agreement was seriously deficient; that on its face it neither made the black employees whole nor satisfied the dictates of Title VII; that the relief supplied was inadequate because the goals were statistically improper, there was no firm commitment to timetables, and there was no relief from illegal testing. Plaintiffs had set out other objections as well. According to plaintiffs, the notices sent out by Gulf did not even explain how back pay was computed.

The conclusion is inescapable that the court's limitation on communications was intended to further employees' accepting conciliation awards in preference to participat-

ing in the suit.[12] Pretermitting whether a court can ever appropriately do this, in this instance it could not, in deciding "appropriateness," elect to favor conciliation and frustrate or chill the right of black employees to choose the litigation route by cutting them off from talking with the named plaintiffs and with the only attorneys who had direct expertise about the suit.

The majority has failed to take into consideration the benefits flowing from communication between the parties and the potential class members. In racial discrimination cases group solidarity may be vital to trigger and to sustain the willingness to resort to legal remedies for the removal of discrimination, but the court order bars black plaintiffs from all communication with fellow blacks employed by Gulf concerning this case. The majority also does not give weight to the need and desire of potential class members for advice of counsel concerning back pay versus lawsuit. The order permits a potential class member to confer with attorneys for plaintiffs at the prospective class member's request. Pragmatically this is a dubious exception. A prospective class member must find out who the attorneys are and when and where to see them, but the actual class members are forbidden to give him this information—or any other information about the case—without prior court approval, nor can counsel furnish this information to potential class members generally.

The wide disparity between what was done here and normal judicial procedures is demonstrated by posing this

12. If not otherwise clear, the court's approach was made clear by its direct entry into the conciliation effort (discussed below), and its withholding action on plaintiffs' request for permission to send the proposed notice until after the time had expired for accepting back pay awards.

question: "What would have happened if Gulf had asked for a temporary injunction imposing the exact restrictions that were imposed in this case?" I believe that the court would have insisted upon requirements of notice, time limits, proof of likelihood of harm, the public interest and similar familiar requirements, and this court would have reviewed an injunction under the usual standards, especially since constitutional rights are involved.

The limitations I suggest do not diminish the significance of the potential problems seen by the draftsmen of the *Manual* and by the majority here. I would simply require a showing that the problems are real and not imaginary.

To the extent the majority bases its approval of the lower court's orders on the premise that it is always appropriate to restrict communications in class actions, that premise is peculiarly unfounded in this case. The counsel silenced without factual showing include those from the Legal Defense Fund, recognized by the Supreme Court as having "a corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation," *NAACP v. Button,* 371 U.S. 415 at 422, 83 S.Ct. 328 at 332, 9 L.Ed.2d 405 at 411-12 (1963), and engaged in "a different matter from the oppressive, malicious or avaricious use of the legal process for purely private gain." *Id.* at 443, 83 S.Ct. at 343, 9 L.Ed.2d at 424. *See also Miller v. Amusement Enterprises, Inc.,* 426 F.2d 534, 539 n.4 (CA5, 1970).

(2.) *Court involvement in conciliation*

Apart from the order's limit on communications, it inappropriately involved the court in the extra-judicial con-

ciliation effort. Gulf had mailed out back pay offers before suit was filed. In its motion to modify Judge Steger's order, Gulf asked the court to direct the clerk to send notices to all employees who had not accepted its offer and signed releases. Gulf's theory was that the court could do this under its power to supervise a settlement. The court granted the motion and extended the time for acceptance to 55 days from the date of the clerk's notice. The back pay offers were not offers to settle a lawsuit. The nudge given to black employees who had not accepted Gulf's offer, given under the official imprimatur of the court, was not permissible.

I would hold that the order was improvidently entered under the terms of Rule 23(d). Perhaps Rule 23(d) merely restates an implied power of the court. If that is so, exercise of the power is limited by the same restraints on the court's discretion that I have already discussed. I turn then to constitutional limitations.

III. The constitutional issues

The general rule is that otherwise protected utterances concerning the courts may be punished by contempt only if they pose "an imminent, not merely a likely threat to the administration of justice." *Craig v. Harney,* 331 U.S. 367, 376, 67 S.Ct. 1249, 1255, 91 L.Ed. 1546, 1552 (1947). The likelihood must be great that a serious evil will result, and the evil itself must be substantial. *Bridges v. California,* 314 U.S. 252, 260-63, 62 S.Ct. 190, 192-94, 86 L.Ed. 192, 202-03 (1941). Significantly, it is these two cases to which the *Manual* turns in addressing constitutional limitations. Pt. 2, § 141, n.33. Nor does the constitutional rule change when applied to lawyers,

even when they participate in the judicial process. *In re Halkin,* ____U.S. App. D.C.____, 598 F.2d 176, 47 Cr. L. Rep. 2413 (1979). A lawyer's First Amendment rights to comment about pending or imminent litigation can be proscribed only if his comments pose a " 'serious and imminent threat' of interference with the fair administration of justice." *Chicago Council of Lawyers v. Bauer,* 522 F.2d 242, 249 (CA 7, 1975), *cert. denied,* 427 U.S. 912, 96 S.Ct. 3201, 49 L.Ed.2d 1204 (1976) (quoting *In re Oliver,* 452 F.2d 111 (CA 7, 1971)); *accord, Chase v. Robson,* 435 F.2d 1059, 1061 (CA 7, 1970); *cf. U. S. v. Tijerina,* 412 F.2d 661, 666 (CA 10), *cert. denied,* 396 U.S. 990, 90 S.Ct. 478, 24 L.Ed.2d 452 (1969) (reasonable likelihoods that comments by criminal defendants will prevent a fair trial justifies court order prohibiting extrajudicial comments).

In this case the subject matter of the restraint on counsel's right to talk with potential class members about the case is plenary. The restraint is not limited to prohibiting solicitation of potential clients, discussed below. The attorneys may not counsel a black employee free of any effort to solicit him. The Third Circuit, in *Rodgers,* in holding invalid a local rule that contained a similar prohibition on communications between counsel and potential class members [13] did not reach the constitutional issue but noted the problem:

> The imposition of such a condition upon access to the Rule 23 procedural device certainly raises serious first amendment issues. *See New Jersey*

13. The local rule in issue in *Rodgers* did not include the "constitutional right" exception which has been added to the suggested form in the *Manual.* I discuss below that this does not remove the constitutional issue.

State Lottery Comm'n v. United States, 491 F.2d 219 (3rd Cir.), cert. granted, 417 U.S. 907, 94 S.Ct. 2603, 41 L.Ed.2d 211 (1974). There is no question but that important speech and associational rights are involved in this effort by the NAACP Legal Defense and Education Fund, Inc. to communicate with potentiol black class members on whose behalf they seek to litigate issues of racial discrimination. *See, e. g., United Transportation Union v. State Bar,* 401 U.S. 576, 91 S.Ct. 1076, 28 L.Ed.2d 339 (1971); *NAACP v. Button,* 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963). And the interest of the judiciary in the proper administration of justice does not authorize any blanket exception to the first amendment. *See Wood v. Georgia,* 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed.2d 569 (1962); *Craig v. Harney,* 331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed. 1546 (1947); *Pennekamp v. Florida,* 328 U.S. 331, 66 S.Ct. 1029, 90 L.Ed. 1295 (1946); *Bridges v. California,* 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192 (1941). Whatever may be the limits of a court's powers in this respect, it seems clear that they diminish in strength as the expressions and associations sought to be controlled move from the courtroom to the outside world. *See* T. Emerson, The System of Freedom of Expression 449 et seq. (1970).

508 F.2d at 162-63.

Next I turn from the general restraint on the attorney to the specific restriction against solicitation in subparagraph (a) of ¶ 2 of the order: "[S]olicitation directly or indirectly of legal representation of potential and actual

class members who are not formal parties to the class action." *NAACP v. Button*, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963), and its progeny, *In re Primus*, 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978), *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576, 91 S.Ct. 1076, 28 L.Ed.2d 339 (1971), *United Mine Workers v. Illinois Bar Ass'n*, 389 U.S. 217, 88 S.Ct. 353, 19 L.Ed.2d 426 (1967), and *Railroad Trainmen v. Virginia State Bar*, 377 U.S. 1, 84 S.Ct. 1113, 12 L.Ed.2d 89 (1964), mandate the conclusion that subparagrph (a) is unconstitutional. In *Button*, the Court concluded that NAACP solicitation of persons to bring civil rights suits was protected activity under the First and Fourteenth amendments. 371 U.S. at 428-29, 83 S.Ct. at 335, 9 L.Ed.2d at 415.[14] The solicitation was treated as a mode of political expression effectuated through group activity falling within the sphere of associational rights guaranteed by the First Amendment. The solicitation activities considered in *Button* included holding meetings to explain legal steps needed to achieve desegregation. At these meetings forms were circulated which authorized LDF attorneys "to represent the signers in legal proceedings to achieve desegregation." 371 U.S. at 421, 83 S.Ct. at 332, 9 L.Ed.2d at 411.

In view of Gulf's statements to the trial court and the countering affidavit by plaintiffs' attorney, we do not know whether there has been express solicitation in this case similar to the distribution of forms in *Button*.[15]

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14. Because this case involves a restriction imposed by a federal court, the Fourteenth Amendment is not implicated.

15. The notice that plaintiffs asked leave to send does not explicitly solicit persons to engage plaintiffs' attorneys or to join in the class but urges employees to seek legal advice and to become in-

Whether plaintiffs' attorneys' attendance at the meeting was solicitation is not determinative. Here, as in *Button*, the subject matter is racial discrimination. Plaintiffs' attorneys are already engaged on behalf of black employees in seeking to vindicate their civil rights through court action, while in *Button* they were seeking clients to begin a suit. In both cases the activities at issue are those of LDF lawyers. The only material difference is that here employees must choose between the lawsuit and a conciliation offer while in *Button* there had been no conciliation and offer. The people attending the meetings held by the LDF lawyers in *Button*, however, did have to choose between initiating a lawsuit and not participating in a lawsuit. The type of choice the people would have to make here and in *Button* is not so different that the solicitation that could have occurred in this case was outside the scope of activity protected by *Button*. The characteristics of the solicitation that brought it within constitutional protection in *Button* are equally present in this case.

The continued vitality of *Button* was recently affirmed by the Supreme Court in *In re Primus, supra*. There the Court reversed a disciplinary reprimand issued against an ACLU lawyer for solicitation, 436 U.S. at 419, 98 S.Ct. at 1899, 56 L.Ed.2d at 427. The Court considered the economic relationship between the lawyer and the person solicited, the purpose of litigation and the possibility of a conflict of interest between counsel and prospective client. Because the lawyer had no direct financial stake in the

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formed. It tells employees that plaintiffs' attorneys will talk to them without charge, suggests as an alternative talking to some other attorney, and emphasizes that the class action will proceed. No one is expressly urged to join the class, reject a release, or return a check.

case, the case was a means of expressing a political belief, and there was no evidence of overreaching or misrepresentation, the Court concluded that South Carolina's punishment of Primus for solicitation violated her First Amendment rights.[16]

Because the activity prohibited by subparagraph (a) of the district court's order is constitutionally protected activity it is necessary to consider whether there is a compelling government interest that justifies the prohibition and whether the means used are sufficiently specific " 'to avoid unnecessary abridgment of associational freedoms.' " *Id.* at 432, 98 S.Ct. at 1905, 56 L.Ed.2d at 434-35 (quoting *Buckley v. Valeo*, 424 U.S. 1, 25, 96 S.Ct. 612, 637, 46 L.Ed.2d 659, 691 (1976)). The *Primus* Court recognized that "the prevention of undue influence, overreaching, misrepresentation, invasion of privacy, conflict of interest, [and] lay interference," 436 U.S. at 432, 98 S.Ct. at 1905, 56 L.Ed.2d at 435, are evils the state may guard against and that these problems sometimes result from lawyer solicitation of clients. The Court went on to state, however, that prophylactic rules intended to guard against such evils are not permissible when aimed against constitutionally protected forms of solicitation because of their impact on First Amendment rights. *Id.* When dealing with *Button*-type solicitation, as opposed to commercial forms

16. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978), decided the same day as *Primus*, sustained against constitutional objections, bar sanctions of an attorney for solicitation. For purely pecuniary gain he visited in the hospital a person injured in an automobile accident and solicited her as a client. No political expression or associational rights or vindication of illegal racial discrimination was involved. Ohralik based his constitutional claim solely on the commercial speech doctrine. *See also Pace v. Florida*, 368 So.2d 340 (Fla. 1979); *Adler, Barish, Daniels, Levin & Creskoff v. Epstein*, 393 A.2d 1175 (Penn. 1978).

of solicitation, *see Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978), discussed in note 16, *supra*, there must be a showing that the solicitation "in fact involved the type of misconduct" 56 L.Ed.2d at 436, that may be constitutionally guarded against. A showing of potential danger does not suffice.[17] The lower court made no findings whether the substantive evils the court was constitutionally entitled to guard against had occurred. Without such findings subparagraph (a) of the order cannot stand.[18]

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17. As stated by the *Primus* Court.

> Rights of political expression and association may not be abridged because of state interests asserted by appellate counsel without substantial support in the record or findings of the state court. *See First National Bank of Boston v. Bellotti*, 435 U.S. 765, 789, 98 S.Ct. 1407, [1423,] 55 L.Ed.2d 707 (1978); *United Transportation Union v. Michigan Bar*, 401 U.S., at 581, 91 S.Ct. 1076 [, at 1080] 28 L.Ed.2d 339; *Sherbert v. Verner*, 374 U.S. 398, 407, 83 S.Ct. 1790, [1795,] 10 L.Ed.2d 965 (1963); *Button*, 371 U.S. at 442-443, 83 S.Ct. 328 [, at 342-343], 9 L.Ed.2d 405; *Wood v. Georgia*, 370 U.S. 375, 388, 82 S.Ct. 1364, [1371,] 8 L.Ed.2d 569 (1962); *Thomas v. Collins*, 323 U.S. 516, 530, 536, 65 S.Ct. 315 [322, 325,] 89 L.Ed. 430 (1945).

436 U.S. at 434 n.27, 98 S.Ct. at 1906 n.27, 56 L.Ed.2d at 436 n.27.

18. Subparagraph (b) of ¶ 2 of the order forbids solicitation of fees and expenses despite the affidavit setting out that the NAACP provides its services free of charge. Arguably this hypothetical restraint does no injury except to the extent it adds to the overall chilling effect. However, I think it is appropriate to comment on it since it is part of the *Manual's* form. In *United Transportation Union v. State Bar of Michigan, supra*, the Supreme Court interpreted *Button* and cases following it to stand for the proposition that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." *Id.* at 585, 91 S.Ct. at 1082, 28 L.Ed.2d at 347. In at least some situations the collection or solicitation of funds to defray litigation costs is a necessary adjunct to obtaining meaningful access to the courts. I would, therefore, give such activity constitutional protection in appropriate cases. The degree of protection would vary according to the use to which the funds are to be put. If they are to be used to pay lawyers, the solicitation presents some of the dangers

Subparagraph (d) of ¶ 2 is applicable to this case and is in my view facially unconstitutional. It is narrower than the plenary proscription in the first sentence of the order, which prohibits all communications concerning the suit. Subparagraph (d) prohibits what might be called "objectionable communications." It prohibits all communications "which *may* tend to misrepresent [the class action] . . . and . . . which *may create* impressions tending, without cause to reflect adversely on any party, any counsel, this Court or the administration of justice." (Emphasis added.) The order is overbroad because it is not limited to the clear and present danger test. "May tend to misrepresent," and "may create impressions" are not enough to justify suppression of protected speech. *See Chicago Council of Lawyers v. Bauer, supra* at 249. Also, while speech that poses an imminent threat to the fair administration of justice may be properly prohibited, speech that reflects adversely on any party or counsel may not. The only interests to which the First Amendment may be subordinated are compelling government interests. The government has no compelling interest in assuring that nothing unflattering will be said about Gulf or its attorneys.

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recognized in *Primus* and *Ohralik* that a state or court may properly guard against. If the funds are to be used to defray litigation expenses, the solicitation is closer to the heart of gaining access to the courts. *See Norris v. Colonial Commercial Corp.*, 77 F.R.D. 672, 673 (S.D. Ohio, 1977) (solicitation of funds to defray litigation expenses of class action permitted with certain requirements imposed on the content of the solicitation letter). *See also Sayre v. Abraham Lincoln Federal Savings & Loan Ass'n*, 65 F.R.D. 379, 384-86 (E.D. Penn., 1974), *modified*, 69 F.R.D. 117 (1975).

Subparagraph (c) of ¶ 2, relating to solicitation of "opt out" requests, seems to me to have no application to this case. It applies only to Rule 23(b)(3) class actions, and this action was brought pursuant to 23(b)(2).

It seems to me unnecessary to dwell at length on the vagueness of the order, particularly subparagraph (d). In advising a potential class member of the relative merits of class action versus back pay offered under the conciliation award, counsel will almost inevitably say something that will be construed to reflect upon Gulf's offer—indeed that is at the heart of this whole matter of lawsuit versus settlement. If counsel goes to an employees' meeting at all,[19] the only safe advice to him is to remain mute.

In a thoughful analysis of the constitutional issues involved in this case, District Judge Boyle, in *Waldo v. Lakeshore Estates, Inc.*, 433 F.Supp. 782 (E.D. La., 1977), rejected a constitutional attack on his district's Local Rule 2.12(e) which is identical to the *Manual's* suggested rule. The court recognized that its rule.

> restricts not only certain expressions by parties and counsel, but also impinges upon the constitutionally-derived interest of the recipient(s) to secure the communication. . . . Likewise limited by the rule's operation is the opportunity of the plaintiff organization to communicate concerning legal redress with those members who are not formal parties to the suit, which activity ordinarily would be entailed in the freedom of association and the collective right of an organizational membership to achieve effective judicial access.

Id. at 787 (citations and footnote omitted). The court then went on to catalogue the interests served by the

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19. Assuming merely being there is not "indirect communication" as Gulf would seem to contend, *see* n.9, *supra*.

Local Rule: (1) prohibition of solicitation of representation or funds protects laymen from unscrupulous attorneys and helps preserve the legal profession's image; (2) preservation of the court's obligation "to direct the 'best notice practicable' to class members, advising them of their privilege to exclude themselves from the class," *id.* at 790, pursuant to Rule 23(c)(2) for class actions brought under Rule 23(b)(3); and (3) the administration of justice by preventing misrepresentations. *Id.* at 790-91. The court found these objectives sufficiently important to override the inhibitions on First Amendment rights and that the rule is the least drastic alternative.

I have several problems with the district court's analysis. First, the three categories of interests served by the rule can be tied to the specific prohibitions. The court does not explain how the plenary prohibition against all communications absent prior approval serves the specified goals other than to note that "the ingenuity of those determined to wrongly take advantage of the class action procedure would likely prevail over any . . . attempt at prohibition by itemization." *Id.* at 791-92. I think the plenary prohibition in the first sentence of ¶ 2 of the order is facially overbroad. Communications that do not threaten any of the interests enumerated by the court are prohibited. When dealing with First Amendment rights, greater specificity is required.

District Judge Bue of the Southern District of Texas reached the same conclusion as I reach in his analysis of the amendments his district adopted to the *Manual's* suggested rule. The Southern District's rule contains only the specific prohibitions, dropping the across-the-board re-

straints. The primary reason for the change was to avoid a violation of the First Amendment by overbreadth: "The key to a constitutional rule which regulates class communication is to narrow down those instances in which a prior restraint is imposed to those in which the types of communications subject to judicial review before dissemination are clearly defined and clearly capable of Rule 23 abuse." Bue, *Analysis of Proposed Revision of Local Rule 6 of the United States District Court for the Southern District of Texas,* (quoted in *Bulletin, Manual for Complex Litigation,* Federal Judicial Center, 9-10 (Aug. 25, 1978)).

Also, *Waldo* fails to distinguish between commercial forms of solicitation and *Button*-type solicitation. The significance of this distinction has already been discussed. Because the rule does not make this distinction, its prohibition on solicitation is overbroad. The government interests that may legitimately be protected by prohibiting commercial solicitation do not usually need to be protected when *Button*-type solicitation is involved because it does not pose the same dangers as commercial solicitation. Moreover, the constitutional scrutiny given to a ban on commercial solicitation or punishment for engaging in such solicitation is significantly lower than the scrutiny given prohibitions on *Button*-type solicitation. Commercial solicitation is protected only by the commercial speech doctrine, which requires a lower level of scrutiny than required when there is an infringement of the constitutional rights of association and political expression which occurs when *Button*-type solicitation is prohibited. *Compare In re Primus, supra, with Ohralik v. Ohio State Bar Association, supra.*

The *Waldo* court's concern with protecting the administration of justice from misrepresentations of cases pending before it is legitimate. But the "reasonable likelihood" standard incorporated in the rule simply fails to comply with constitutional standards.

The proviso permitting post-distribution filing of a notice thought to be constitutionally protected is not a cure. "This provision does not eliminate—indeed it highlights—the overbreadth and resultant chilling effect of the [*Manual's*] proposed rule." Comment, 88 Harv. L. Rev. 1911, 1922 n.74 (1975). The majority's conclusion that the assertion of a good faith belief gives total protection is disingenuous. The district court would still be entitled to inquire into the bona fides of counsel's belief.[20] Because counsel may be called upon to establish the basis for his good faith belief, and therefore is put at risk for possibly violating the court's order, the good faith exception does not ameliorate the chilling effect of the order. It is little comfort for a conscientious attorney to be told that he may communicate with potential class members but that at a later time may be called upon by the court to justify the communication.[21] Even if facially a cure, the constitu-

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20. Although *Screws v. U.S.*, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945), probably requires a showing of specific intent to violate the court's order, that is certainly not the total protection from punishment envisioned by the majority; indeed, it indicates that assertion of good faith is not total protection.

21. The majority argues that "[o]nce plaintiffs submitted the proposed communication to the district judge . . . the exemption for communications they asserted were constitutionally protected was no longer relevant." The issue before the district court on a motion for permission to distribute would be whether the proposed communication is constitutionally protected, but the issue on this appeal is the constitutionality vel non of the order. In our examination of this issue, the constitutional exception provision is certainly relevant; in-

tional exception is no cure as applied to these plaintiffs who prudently asked for pre-distribution approval of the leaflet reproduced above rather than risk post-distribution filing and were given a belated denial.

IV. Conclusion

The district court misued its discretion under Rule 23 (d) and violated the constitutional rights of plaintiffs' counsel, named plaintiffs and all other actual or potential members of the class by entering the orders. I dissent from Part IV of the majority opinion and would vacate the district court's order as modified.

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deed the unwillingness of the attorneys to rely on the exception in distributing the leaflet demonstrates the order's chilling effect. It is the proof of the pudding. Having lost on their motion to have the order restraining their communications declared unconstitutional, the reasonable—and respectful—course for them to follow was to ask the court's guidance before distributing the leaflet rather than take their chances under the constitutional exception. I assume that the majority does not mean that had the plaintiffs specifically renewed their constitutional objection to the order at the time they requsted permission to distribute the leaflet the chilling effect of the order could not have been considered by the district court. Such a position would be untenable. It is not necessary to disobey a court order to be able to make a chilling effect attack on it. Indeed, the exact opposite is normally required. A party may not violate a court order and then in a contempt proceeding for violating the order challenge its constitutionality. *Walker v. City of Birmingham*, 388 U.S. 307, 316-17, 87 S.Ct. 1824, 1830, 18 L.Ed.2d 1210, 1217 (1967).

JAMES C. HILL, Circuit Judge, specially concurring:

Being bound by the prior decisions of this Court, as I ought to be, I concur. *Beker Phosphate Corp. v. Muirhead,* 581 F.2d 1187, 1190 n.10 (5th Cir. 1978).

My observations concerning the path upon which we embarked in *Zambuto v. American Telephone and Telegraph Co.,* 544 F.2d 1333 (5th Cir. 1977) are set out in my dissent to the opinion for the En Banc Court n *White v. Dallas Independent School District,* 581 F.2d 556, 563 (5th Cir. 1978) (Hill, J., concurring in part and dissenting in part).

APPENDIX D

First Order of the District Court Limiting Communications, Dated May 28, 1976

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE EASTERN DISTRICT
OF TEXAS
BEAUMONT DIVISION

CIVIL ACTION NO. B-76-183-CA

WESLEY P. BERNARD, ET AL,
Plaintiffs,

VS.

GULF OIL COMPANY, ET AL,
Defendants.

ORDER

Having considered the Motion by the Defendant, Gulf Oil Corporation, to limit communications with any potential or actual class member;

IT IS ORDERED that, in this action, all parties hereto and their counsel are forbidden directly or indirectly, orally or in writing, to communicate concerning such action with any potential or actual class member not a formal party to the action. The communications forbidden by this order include, but are not limited to, (a) solicita-

tion directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action; (c) solicitation by formal parties to the class action of requests by class members to opt out in class actions under subparagraph (b) (3) of Rule 23, F.R.Civ.P.; and (d) communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the class action, and of any impressions tending, without cause, to reflect adversely on any party, any counsel, the Court, or any administration of justice. The obligations and prohibitions of this order are not exclusive. All other ethical, legal and equitable obligations are unaffected by this order.

This order shall be effective until Judge Fisher returns and can hear the matter upon formal motion.

Counsel for defendant, Gulf Oil Corporation, shall present a motion on this matter to Judge Fisher as soon as possible upon Judge Fisher's return.

Date: May 28, 1976.

WILLIAM M. STEGER
United States District Judge

APPENDIX E

Second Order of the District Court Limiting Communications, Dated June 22, 1976

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE EASTERN DISTRICT
OF TEXAS
BEAUMONT DIVISION

B-76-183-CA

WESLEY P. BERNARD, ET AL,
Plaintiffs

VS.

GULF OIL COMPANY, ET AL,
Defendants

ORDER

The within and foregoing motion of Gulf Oil Corporation to modify Judge Steger's Order dated May 28, 1976, having been considered;

IT IS ORDERED:

(1) That Gulf's motion to modify Judge Steger's Order dated May 28, 1976 is granted;

(2) That Judge Steger's Order dated May 28, 1976 be modified so as to read as follows:

In this action, all parties hereto and their counsel are forbidden directly or indirectly, orally or in writing, to

communicate concerning such action with any potential or actual class member not a formal party to the action without the consent and approval of the proposed communication and proposed addressees by order of this Court. Any such proposed communication shall be presented to this Court in writing with a designation of or description of all addressees and with a motion and proposed order for prior approval by this Court of the proposed communication. The communications forbidden by this order include, but are not limited to, (a) solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action; (c) solicitation by formal parties to the class action of requests by class members to opt out in class actions under subparagraph (b)(3) of Rule 23, F.R. Civ. P.; and (d) communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the class action, and of any actual or potential Court orders therein which may create impressions tending, without cause, to reflect adversely on any party, any counsel, this Court, or the administration of justice. The obligations and prohibitions of this order are not exclusive. All other ethical, legal and equitable obligations are unaffected by this order.

This order does not forbid (1) communications between an attorney and his client or a prospective client, who has on the initiative of the client or prospective client consulted with, employed or proposed to employ the attorney, or (2) communications occurring in the regular course of business or in the performance of the duties of public office or agency (such as the Attorney General)

which do not have the effect of soliciting representation by counsel, or misrepresenting the status, purposes or effect of the action and orders therein.

If any party or counsel for a party asserts a constitutional right to communicate with any member of the class without prior restraint and does so communicate pursuant to that asserted right, he shall within five days after such communication file with the Court a copy of such communication, if in writing, or an accurate and substantially complete summary of the communication if oral.

(3) That Gulf be allowed to proceed with the payment of back pay awards and the obtaining of receipts and releases from those employees covered by the Conciliation Agreement dated April 14, 1976, between Gulf, the U. S. Equal Employment Opportunity Commission and the Office of Equal Opportunity, U. S. Department of the Interior; That the private settlement of charges that the employer has violated Title VII is to be encouraged, *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3589 (U.S. April 20, 1976).

(4) That the Clerk of the Court mail a notice to all employees of Gulf at its Port Arthur Refinery who are covered by the Conciliation Agreement and who have not signed receipts and releases for back pay awards informing them that they have 45 days from the date of the Clerk's notice to accept the offer as provided for by the Conciliation Agreement or such offer will expire until further order of the Court;

(5) That the contents of the notice be the same as that set out in Appendix I;

(6) That Gulf bear the expense of mailing the notice

and a copy of the Court's order to the individuals covered by item (4) above;

(7) That all employees who have delivered receipts and releases to Gulf on or before 55 days from the date of the Clerk's notice shall be deemed to have accepted the offer as contained in the Conciliation Agreement;

(8) That any further communication, either direct or indirect, oral or in writing (other than those permitted pursuant to paragraph (2) above) from the named parties, their representatives or counsel to the potential or actual class members not formal parties to this action is forbidden;

(9) That Gulf inform the Court 65 days from the date of the Clerk's notice to be sent by the Clerk of the Court of the names of potential or actual class members who have accepted the offer of back pay and signed receipts and releases pursuant to the Conciliation Agreement and the names of those who have refused or failed to respond.

It is Plaintiff's contention that any such provisions as hereinbefore stated that limit communication with potential class members are constitutionally invalid, citing *Rodgers v. United States Steel Corporation*, 508 F.2d 152 (3rd Cir. 1975), *cert. denied*, 420 U.S. 969 (1975). This Court finds that the *Rodgers* case is inapplicable, and that this order comports with the requisites set out in the *Manual for Complex Litigation*, Section 1.41, p. 106 CCH Edition 1973, which specifically exempts constitutionally protected communication when the substance of such communication is filed with the Court.

ENTERED this the 22nd day of June, 1976.

JOE J. FISHER
United States District Judge

APPENDIX F

Order of the District Court Granting Defendant's Motion for Summary Judgment, Dated January 11, 1977

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

NO. B-76-183-CA

WESLEY P. BERNARD, et al.

VS.

GULF OIL COMPANY, et al.

ORDER

BE IT REMEMBERED that on this day came on for consideration the Motion to Dismiss of defendant Gulf Oil Company [Gulf], joined in by the defendant, Oil, Chemical and Atomic Workers International Union and Local Union No. 4-23 [Unions]. After proper notice to the parties by an Order of this Court, the Motion to Dismiss is to be treated under Rule 56, F.R.Civ.P., because the defendants offered, and the Court accepted evidence extrinsic to the pleadings in the form of affidavits. The parties were allowed more than 10 days to submit any additional pertinent information. Taking into consideration all material presented by the parties prior and subsequent to the decision to treat the Motion as one for

summary judgment, the Court must conclude that the Motion is well taken and should be granted in all particulars.

While it is not necessary that all members of a class bring a charge with the Equal Employment Opportunity Commission [EEOC] as a prerequisite to joining as co-plaintiff in litigation, *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496 (5th Cir. 1968), the class representatives must show that they have complied with the required preliminary administrative steps and timely filed suit in this Court. *Macklin v. Spector Freight Systems, Inc.*, 478 F. 2d 979 (D.C. Cir. 1973). At this stage in the history of Title VII litigation, it goes without saying that a plaintiff who seeks to represent a class may not bring suit in District Court until he has filed a complaint with the EEOC. 42 U.S.C. § 2000e-5(f) (1974).

The affidavits submitted reveal that neither of the plaintiffs Elton Hayes, Sr., nor Rodney Tizeno has filed a complaint with the EEOC with regard to a discrimination charge against Gulf or the Unions. Thus neither Hayes nor Tizeno may maintain suit in their own right, *Love v. Pullman Co.*, 404 U.S. 522 (1972); *East v. Romine, Inc.*, 518 F.2d 332 (5th Cir. 1975), and therefore could not adequately represent a class. Rule 23(a), F.R.Civ.P.

Of course this failing should not prevent maintenance of the Title VII portion of this suit as a class action if others of the named plaintiffs have satisfied the jurisdictional requirements and could raise a viable claim here. Unfortunately this is not the case.

Title VII requires that suit be instituted in the District Court within 90 days after notice from the EEOC that

> * * * the Commission has not filed a civil action under this section * * * *or* the Commission has not entered into a conciliation agreement to which the person aggrieved is a party. (emphasis supplied).
>
> 42 U.S.C. § 2000e-5(f)(1).

Plaintiffs Willie Johnson, Sr., Wesley Bernard, and Hence Brown received such notice from the EEOC on February 26, 1975, after it was sent the previous day. Plaintiff Willie Whitley's failure of conciliation letter was sent December 4, 1973. The mailing of these letters began the running of the 90 day period for filing a civil action on the associated claim, under the clear language of the statute set out above.

Unfortunately the EEOC had adopted a troublesome two letter procedure whereby after sending the failure of conciliation notice, it would later issue a "right to sue" letter at the complaintant's request. The first letter, however, advised the claimant that he should contact an attorney or request assistance from the EEOC in doing so prior to the issuance of the "right to sue" letter and prepare for suit if desired. The two letter system was entirely a figment of the imagination of the EEOC, since it is not mandated or suggested by 42 U.S.C. § 2000e-5(f). As is ably pointed out by Gulf in its brief, the events which trigger notice are listed in the disjunctive so that the occurrence of any one of the listed events (such as failure of conciliation) and subsequent notice thereof empowers the claimant with the right to bring action in this Court. To hold that the 90 day period did not begin to run until after the claimant requests and receives the second letter would amount to allowing him unlimited discretion in choosing a time for filing suit.

The leading decision to the contrary, *Tuft v. McDonnell Douglas Corporation,* 517 F.2d 1301 (8th Cir. 1975), has not been followed in this Circuit. *See Turner v. Texas Instruments, Inc.,* 401 F.Supp. 1179 (N.D. Texas 1975); *Kelley v. Southern Products,* Civ. No. 19243 (N.D. Georgia 1975); *Barfield v. A.R.C. Security, Inc.,* 9 E.P.D. ¶ 10,136 (N.D. Georgia 1975). Judge Porter's decision in *Turner v. Texas Instruments, Inc., supra,* is most persuasive in its examination of 42 U.S.C. § 2000e-5(f), its legislative intent, and cases decided thereunder. His analysis of the erroneous rationale employed in cases supporting the two letter system, and the fact that jurisdiction must be construed strictly, *Genovese v. Shell Oil Co.,* 488 F.2d 84 (5th Cir. 1973), convinces this Court that the 90 day period for filing suit begins when the notice of failure of conciliation is sent by the EEOC.

Since this cause was not filed until May 18, 1976, more than 90 days had elapsed from the sending of the failure of conciliation notice by the EEOC. The Title VII claim must be dismissed.

Plaintiffs' secondly assert a cause of action under 42 U.S.C. § 1981. Since the claim was the subject of complaints filed with the EEOC in 1967 by three of the plaintiffs, nine years had elapsed before court action on it was initiated. Since the plaintiffs allowed more than two years to run before filing suit, and because the filing of an EEOC complaint does not toll the limitation period, *Johnson v. Railway Express Agency,* 421 U.S. 454 (1975), any cause of action under § 1981 is barred and must be dismissed. Tex. Rev. Civ. Stat. Ann. art 5526(4). Defendants' reasoning is convincing that all plaintiffs complain of the identical pattern of discrimination which was

the subject of the Bernard, Brown and Johnson EEOC complaint, which pattern has long since been eliminated. Thus, any claim by Tizeno, Hayes and Whitley must be dismissed along with that of Bernard, Brown and Johnson. The Court additionally finds no circumstances of continuous discrimination that would justify application of the principles discussed in *Williams v. Norfolk & Western Railroad Co.*, 530 F.2d 539, 542 (4th Cir. 1975); *Johnson v. Railway Express Agency, supra* at 467 n. 13; and *Briggs v. Brown & Williamson Tobacco Co.*, 414 F.Supp. 371, 378 (E.D. Va. 1976).

The Court also acknowledges a most compelling argument for the application of the equitable doctrine of laches in this particular case, based not only on the obvious lack of diligence on the part of the plaintiffs, but a recognition that to put this defendant to the task of obtaining records and locating witnesses after the expiration of such a lengthy period would pose a particularly onerous burden. *Afro-American Patrolmens League v. Duck*, 503 F.2d 294, 299 (6th Cir. 1974). In this regard see the affidavit of C. B. Draper, made a part of the record on October 15, 1976. It is accordingly

ORDERED, ADJUDGED and DECREED that summary judgment be and the same is hereby granted for the defendants in this cause, as to both the class action and any individual claims of discrimination by the plaintiffs.

RENDERED this the 11th day of January, 1977.

JOE J. FISHER
United States Chief District Judge

APPENDIX G

Affidavit of Herbert C. McClees Concerning Respondent Whitley, Dated August 2, 1976

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CIVIL ACTION NO. B-76-183-CA

WESLEY P. BERNARD, ET AL,
Plaintiffs

V.

GULF OIL COMPANY, ET AL,
Defendants

AFFIDAVIT OF HERBERT C. McCLEES

Before me, on this day personally appeared Herbert C. McClees who upon oath says:

I am the District Director of the Houston District Office of the Equal Employment Opportunity Commission, and in that capacity I hereby certify that the attached copies hereto are true and correct copies of the official records of the Equal Employment Opportunity Commission in the charge filed by Mr. Willie Whitley, Charge No. THU3-0454.

1. Letter dated December 4, 1973, from the EEOC Houston District Office, to Charging Party Willie Whitley informing Mr. Whitley that the EEOC had found no cause to believe discrimination had occurred pursuant to Mr. Whitley's charge, and an attached Notice of Right to Sue informing Mr. Whitley that he had 90 days from the receipt of said Notice to bring an action against Gulf Oil Corporation in federal district court.

2. Returned receipt for certified mail signed by Mr. Willie Whitley, indicating that he receive certified letter No. 599314 from the EEOC Houston District Office on December 5, 1973.

HERBERT C. McCLEES
Herbert C. McClees
District Director
Equal Employment Opportunity
Commission
Houston District Office

Sworn to and subscribed before
me this 2nd day of August, 1976.

BETTY L. DEFFERARI
Notary Public in and for
Harris County, Texas.

My Commission Expires June 1, 1977.

G-3

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Houston District Office
2320 La Branch, Room 1101
Houston, Texas 77004

CERTIFIED MAIL

Charge No. THU3-0454
Case No. YHU4-433
Date Filed: 09-06-72
Date Served: 10-02-72

Willie Whitley
1619 East 13th Street
Port Arthur, Texas 77640 Charging Party

Gulf Oil Corporation
P. O. Box 701
Port Arthur, Texas 77640 Respondent

DETERMINATION

Under the authority vested in me by Section 1601.19b of the Commission's procedural rules, 37 Fed. Reg. 20165 (September 27, 1972), I issue, on behalf of the Commission, the following determination as to the merits of the subject charge.

The timeliness and all other requirements have been met; within the meaning of Title VII, the Respondent is an employer.

The Charging Party alleges that Respondent violated Title VII with respect to training and other terms and conditions of employment because of his race, Negro. The evidence does not support the charge.

Evidence obtained by the Commission shows that the Charging Party was not denied training and disqualified

for reasons which were not, in and of themselves, illegally discriminatory. Further, the evidence shows that other persons, regardless of race, were treated in the same general manner as was the Charging Party. No evidence was discovered which shows that persons of other races, ethnic groups, or sex were treated differently from the Charging Party, in similar circumstances.

The Commission has many times held that in situations such as this, where persons are equally treated there is no violation of Title VII. The Charging Party's mere assertion that there was discrimination under Title VII is not sufficient for a finding of illegal employment practices.

Having examined the entire record, I conclude that there is not reasonable cause to believe that Title VII of the Civil Rights Act of 1964, as amended, has been violated in the manner alleged.

This determniation concludes the Commission's processing of the subject charge. Should the Charging Party wish to pursue this matter further, the Charging Party may do so by filing a private action in Federal District Court within 90 days after receipt of this letter and by taking the other procedural steps set forth in the enclosed Notice of Right-to-Sue.

On behalf of the Commission:

HERBERT C. McCLEES,
Herbert C. McClees,
District Director

Date: Dec. 4, 1973.

G-5

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE

DATE DEC 4 1973

Willie Whitley 1619 East 13th Street Port Arthur, Texas 77640	FROM: EQUAL EMPLOYMENT OPPORTUNITY COMMISSION HOUSTON DISTRICT OFFICE 2320 LA BRANCH - ROOM 1101 HOUSTON, TEXAS 77004

THIS CHARGE HAS BEEN DISMISSED FOR THE FOLLOWING REASON:	EEOC REPRESENTATIVE	
[X] NO REASONABLE CAUSE [ ] UNTIMELY CHARGE	Max Fuentes, Jr., Attorney	
[ ] NO JURISDICTION [ ] FAILURE TO PROCEED	TELEPHONE NUMBER 713/226-5611	CASE/CHARGE NUMBER YHU4-433 THU3-0454

If you want to pursue your charge further, you have the right to sue the respondent(s) named in this case in the United States District Court for the area where you live. If you decide to sue, you must do so within ninety (90) days from the receipt of this Notice; otherwise your right is lost.

If you do not have a lawyer or are unable to obtain the services of a lawyer, take this Notice to the United States District Court which may, in its discretion, appoint a lawyer to represent you.

An information copy of this Notice has been sent to the respondent(s) named in this case.

If you have any questions about your legal rights or need help in filing your case in court, call the EEOC representative named above.

Herbert C. McClees,
District Director

SENDER: Be sure to follow instructions on other side

PLEASE FURNISH SERVICE(S) INDICATED BY CHECKED BLOCK(S)
(Additional charges required for these services)

☐ Show to whom, date and address where delivered ☐ Deliver ONLY to addressee

RECEIPT
Received the numbered article described below

REGISTERED NO.

CERTIFIED NO.
599314

INSURED NO.

SIGNATURE OR NAME OF ADDRESSEE (Must always be filled in)
Willie Whitley

SIGNATURE OF ADDRESSEE'S AGENT, IF ANY
Doris M. Whitley

DATE DELIVERED
12-5-73

SHOW WHERE DELIVERED (Only if requested, and include ZIP Code)

Willie Whitley vs Hudson Oil Corp. TH 43-0454

Hudson Oil Corp.

RECEIPT FOR CERTIFIED MAIL—30¢ (plus postage)

No. 599314

SENT TO
Willie Whitley

STREET AND NO.
1619 East 13th St.

P.O., STATE AND ZIP CODE
Port Arthur 77640

POSTMARK OR DATE
12/4/73
161

OPTIONAL SERVICES FOR ADDITIONAL FEES

RETURN RECEIPT SERVICES
1. Shows to whom and date delivered ..... 15¢
With delivery to addressee only ..... 65¢
2. Shows to whom, date and where delivered .. 35¢
With delivery to addressee only ..... 85¢
DELIVER TO ADDRESSEE ONLY ..... 50¢
SPECIAL DELIVERY (extra fee required)

TH 43-0454
MP
Legal

PS Form 3800
Apr. 1971

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See other side)

GPO : 1972 O - 450-343

APPENDIX H

Affidavits of Nacha I. Martinez Concerning Respondent Hayes, Dated August 2, 1976

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CIVIL ACTION NO. B-76-183-CA

WESLEY P. BERNARD, ET AL
Plaintiffs

V.

GULF OIL COMPANY, ET AL
Defendants

AFFIDAVIT OF NACHA I. MARTINEZ

THE STATE OF TEXAS §
COUNTY OF HARRIS §

Nacha I. Martinez being duly sworn, deposes and says:

(1) I am an employee of the United States Equal Employment Opportunity Commission (hereinafter referred to as "the EEOC") and am located in Houston, Texas, where the Commission maintains its Houston District Office. I have worked for the Commission for eight years and presently hold the position of Equal Employment Technician.

(2) In my position as Equal Employment Technician I am custodian of the records, files and office memoranda located in the EEOC's Houston District Office. Specifically, I have custody of files which would show whether a particular person has at any time filed a charge with the EEOC's Houston District Office.

(3) I have made a complete search of the EEOC's Houston District Office's records, and according to our records, Mr. Elton Hayes, Sr. has never filed a charge of discrimination with the EEOC against Gulf Oil Corporation or the Oil, Chemical and Atomic Workers International Union, or Local Union No. 4-23, Oil Chemical and Atomic Workers.

NACHA I. MARTINEZ
Nacha I. Martinez
Equal Employment Technician
Houston District Office
United States Equal Employment
Opportunity Commission

Subscribed and sworn to before
me this 2nd day of August, 1976.

BETTY L. DEFFERARI
Notary Public in and for
Harris County, Texas.

My Commission Expires June 1, 1977.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CIVIL ACTION NO. B-76-183-CA

WESLEY P. BERNARD, ET AL
Plaintiffs

V.

GULF OIL COMPANY, ET AL
Defendants

AFFIDAVIT OF NACHA I. MARTINEZ

THE STATE OF TEXAS §
COUNTY OF HARRIS §

Nacha I. Martinez being duly sworn, deposes and says:

(1) I am an employee of the United States Equal Employment Opportunity Commission (hereinafter referred to as "the EEOC") and am located in Houston, Texas, where the Commission maintains its Houston District Office. I have worked for the Commission for eight years and presently hold the position of Equal Employment Technician.

(2) In my position as Equal Employment Technician I am custodian of the records, files and office memoranda located in the EEOC's Houston District Office. Specifically, I have custody of files which would show whether

a particular person has at any time filed a charge with the EEOC's Houston District Office.

(3) I have made a complete search of the EEOC's Houston District Office's records, and according to our records, Mr. Rodney Tizeno has never filed a charge of discrimination with the EEOC against Gulf Oil Corporation or the Oil, Chemical and Atomic Workers International Union, or Local Union No. 4-23, Oil Chemical and Atomic Workers.

NACHA I. MARTINEZ
Nacha I. Martinez
Equal Employment Technician
Houston District Office
United States Equal Employment
Opportunity Commission

Subscribed and sworn to before
me this 2nd day of August, 1976.

BETTY L. DEFFERARI
Notary Public in and for
Harris County, Texas.

APPENDIX I

Affidavits of Herbert C. McClees Concerning Respondents Johnson, Brown and Bernard, Dated August 2, 1976

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CIVIL ACTION NO. B-76-183-CA

WESLEY P. BERNARD, ET AL
Plaintiffs

V.

GULF OIL COMPANY, ET AL
Defendants

AFFIDAVIT OF HERBERT C. McCLEES

Before me, on this day personally appeared Herbert C. McClees who upon oath says:

I am the District Director of the Houston District Office of the Equal Employment Opportunity Commission, and in that capacity I hereby certify that the attached copies hereto are true and correct copies of the official records of the Equal Employment Opportunity Commission in the charge filed by Mr. Willie Johnson, Sr. Charge No. AU7-6-543/543U.

1. Letter dated February 25, 1975, from James R. Anderson, Equal Opportunity Specialist (E), to Charging Party Willie Johnson regarding the Respondents non-desire to entertain conciliation discussions and that a "Notice of Right to Sue" could be requested.

2. Returned receipt for certified mail signed by Mr. Willie Johnson, Jr. indicating that he received certified letter No. 543499 from James R. Anderson, Equal Opportunity Specialist (E) on February 26, 1975.

HERBERT C. McCLEES
Herbert C. McClees
District Director
Equal Employment Opportunity Commission
Houston District Office

Sworn to and subscribed before
me this 2nd day of August, 1976.

BETTY L. DEFFERARI
Notary Public in and for
Harris County, Texas

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
Houston District Office
2320 La Branch, Room 1101
Houston, Texas 77004

February 25, 1975

Case Nos. AU7-6-504/504U thru
AU7-6-532/532U,
AU7-6-533,
AU7-6-534/534U thru
AU7-6-546/546U and
AU68-8-71/71U

CERTIFIED NO. 543499
RETURN RECEIPT
REQUESTED

Willie Johnson, Sr.
347 W. 18th
Port Arthur, Texas 77640

Dear Mr. Johnson:

On February 19, 1975, the Equal Employment Opportunity Commission's Houston District Office received notice from Gulf Oil Company - U.S. and Oil, Chemical and Atomic Workers, International Union Local 4-23, the Respondents in the above captioned matter, that they do not wish to entertain conciliation discussions to resolve those issues set out under the Commission's Decision as issued on August 15, 1968. You are hereby notified that you may request a "Notice of Right to Sue" from this office at any time. If you so request, the notice will be issued, and you will have ninety (90) days from the date of its receipt to file suit in Federal District Court.

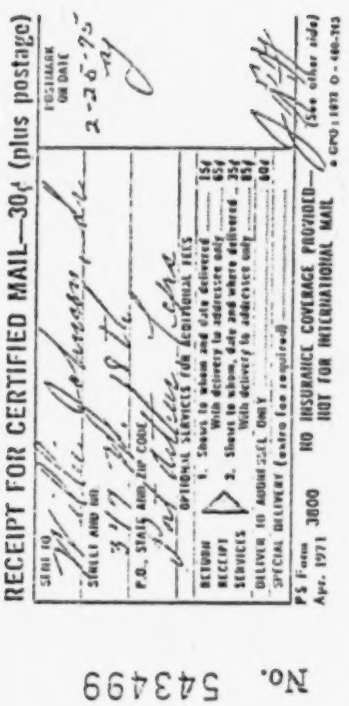
It is advisable that, if you wish to pursue this matter further, you have an attorney ready to proceed with the case prior to issuance of the Notice of Right to Sue. If you do not have an attorney and you wish to proceed in Federal District Court with your case, then call this office for assistance in securing private legal counsel.

If you have any questions, please feel free to call upon me.

Sincerely,

JAMES R. ANDERSON
James R. Anderson
Equal Opportunity Specialist(E)

JRA:slj



RECEIPT FOR CERTIFIED MAIL—30¢ (plus postage)

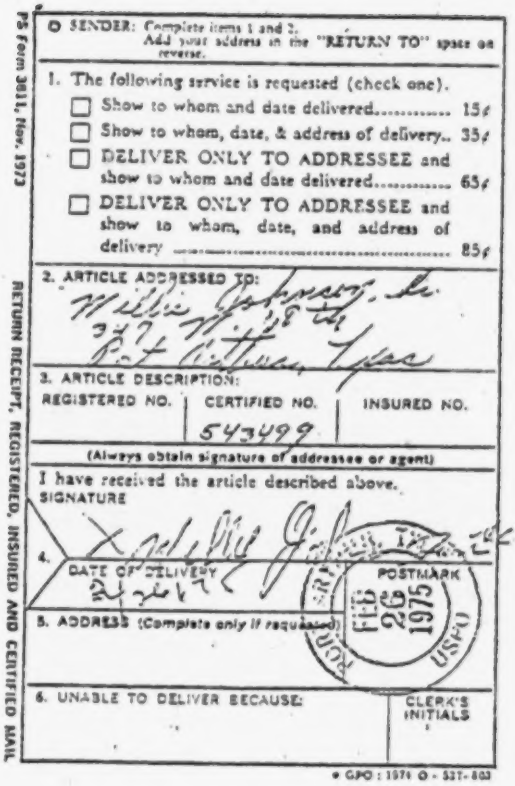
SENT TO: Willie Johnson, Jr.
STREET AND NO.: 347 W. 28th St.
P.O., STATE AND ZIP CODE: Port Arthur, Texas
POSTMARK OR DATE: 2-26-75

OPTIONAL SERVICES FOR ADDITIONAL FEES

RETURN RECEIPT SERVICES
1. Shows to whom and date delivered — With delivery to addressee only — 15¢
2. Shows to whom, date and where delivered — With delivery to addressee only — 35¢
DELIVER TO ADDRESSEE ONLY — 85¢
SPECIAL DELIVERY (extra fee required) — 90¢

PS Form 3800 Apr. 1971 — NO INSURANCE COVERAGE PROVIDED—NOT FOR INTERNATIONAL MAIL (See other side) • GPO : 1971 O - 406-343

No. 543499



PS Form 3811, Nov. 1973 — RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

O SENDER: Complete items 1 and 2. Add your address in the "RETURN TO" space on reverse.

1. The following service is requested (check one).
- ☐ Show to whom and date delivered..... 15¢
- ☐ Show to whom, date, & address of delivery.. 35¢
- ☐ DELIVER ONLY TO ADDRESSEE and show to whom and date delivered..... 65¢
- ☐ DELIVER ONLY TO ADDRESSEE and show to whom, date, and address of delivery ..... 85¢

2. ARTICLE ADDRESSED TO: Willie Johnson, Jr. 347 W. 28th St. Port Arthur, Texas

3. ARTICLE DESCRIPTION:

REGISTERED NO.	CERTIFIED NO.	INSURED NO.
	543499	

(Always obtain signature of addressee or agent)

I have received the article described above.
SIGNATURE: X Willie Johnson Jr.

4. DATE OF DELIVERY: 2-26-75 — POSTMARK: FEB 26 1975 USPO

5. ADDRESS (Complete only if requested)

6. UNABLE TO DELIVER BECAUSE: — CLERK'S INITIALS

• GPO : 1974 O - 537-803

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CIVIL ACTION NO. B-76-183-CA

WESLEY P. BERNARD, ET AL
Plaintiffs

V.

GULF OIL COMPANY, ET AL
Defendants

AFFIDAVIT OF HERBERT C. McCLEES

Before me, on this day personally appeared Herbert C. McClees who upon oath says:

I am the District Director of the Houston District Office of the Equal Employment Opportunity Commission, and in that capacity I hereby certify that the attached copies hereto are true and correct copies of the official records of the Equal Employment Opportunity Commission in the charge filed by Mr. Hence Brown, Charge No. AU7-6-540/540U.

1. Letter dated February 25, 1975, from James R. Anderson, Equal Opportunity Specialist (E), to Charging Party Hence Brown regarding the Respondents non-desire to entertain conciliation discussions and that a "Notice of Right to Sue" could be requested.

2. Returned receipt for certified mail signed by Mr. Hence Brown, indicating that he received certified letter No. 579187 from James R. Anderson, Equal Opportunity Specialist (E) on February 26, 1975.

HERBERT C. McCLEES
Herbert C. McClees
District Director
Equal Employment Opportunity Commission
Houston District Office

Sworn to and subscribed before
me this 2nd day of August, 1976.

BETTY L. DEFFERARI
Notary Public in and for
Harris County, Texas

My Commission Expires June 1, 1977.

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
Houston District Office
2320 La Branch, Room 1101
Houston, Texas 77004

February 25, 1975

Case Nos. AU7-6-504/504U thru
AU7-6-532/532U,
AU7-6-533,
AU7-6-534/534U thru
AU7-6-546/546U and
AU68-8-71/71U

CERTIFIED NO. 579187
RETURN RECEIPT
REQUESTED

Hence Brown
740 E. 14th
Port Arthur, Texas 77640

Dear Mr. Brown:

On February 19, 1975, the Equal Employment Opportunity Commission's Houston District Office received notice from Gulf Oil Company - U.S. and Oil, Chemical and Atomic Workers, International Union Local 4-23, the Respondents in the above captioned matter, that they do not wish to entertain conciliation discussions to resolve those issues set out under the Commission's Decision as issued on August 15, 1968. You are hereby notified that you may request a "Notice of Right to Sue" from this office at any time. If you so request, the notice will be issued, and you will have ninety (90) days from the date of its receipt to file suit in Federal District Court.

It is advisable that, if you wish to pursue this matter further, you have an attorney ready to proceed with the case prior to issuance of the Notice of Right to Sue. If you do not have an attorney and you wish to proceed in Federal District Court with your case, then call this office for assistance in securing private legal counsel.

If you have any questions, please feel free to call upon me.

Sincerely,

JAMES R. ANDERSON
James R. Anderson
Equal Opportunity Specialist(E)

JRA:slj

PS Form 3811, Nov. 1973 RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

3. ARTICLE ADDRESSED TO:

4. ARTICLE DESCRIPTION:

REGISTERED NO. | CERTIFIED NO. | INSURED NO.

(Always obtain signature of addressee or agent)

I have received the article described above.

SIGNATURE

DATE OF DELIVERY (POSTMARK)

5. ADDRESS (Complete only if requested)

6. UNABLE TO DELIVER BECAUSE: CLERK'S INITIALS

☐ 1. The following service is requested (check one).
☐ Show to whom and date delivered ..... 15¢
☐ Show to whom, date, & address of delivery ..... 35¢
☐ DELIVER ONLY TO ADDRESSEE and show to whom and date delivered ..... 65¢
☐ DELIVER ONLY TO ADDRESSEE and show to whom, date, and address of delivery ..... 85¢

☐ 2. RESTRICTED DELIVERY

☐ 3. ADDRESS TO WHICH DELIVERY IS DESIRED, IF DIFFERENT FROM ITEM 1

☐ 4. RESTRICTED DELIVERY

☐ 5. SPECIAL HANDLING

☐ 6. RETURN RECEIPT

☐ 7. SHOW TO WHOM AND DATE DELIVERED

☐ 8. SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY

☐ 9. RESTRICTED DELIVERY

☐ 10. SPECIAL DELIVERY

☐ 11. SHOW TO WHOM AND DATE DELIVERED

☐ 12. SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY

☐ 13. RESTRICTED DELIVERY

☐ 14. SPECIAL DELIVERY

☐ 15. SHOW TO WHOM AND DATE DELIVERED

☐ 16. SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY

☐ 17. RESTRICTED DELIVERY

☐ 18. SPECIAL DELIVERY

☐

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CIVIL ACTION NO. B-76-183-CA

WESLEY P. BERNARD, ET AL
Plaintiffs

V.

GULF OIL COMPANY, ET AL
Defendants

AFFIDAVIT OF HERBERT C. McCLEES

Before me, on this day personally appeared Herbert C. McClees who upon oath says:

I am the District Director of the Houston District Office of the Equal Employment Opportunity Commission, and in that capacity I hereby certify that the attached copies hereto are true and correct copies of the official records of the Equal Employment Opportunity Commission in the charge filed by Mr. Wesley Bernard, Charge No. AU7-6-535/535U.

1. Letter dated February 25, 1975, from James R. Anderson, Equal Opportunity Specialist (E), to Charging Party Wesley Bernard regarding the Respondents non-desire to entertain conciliation discussions and that a "Notice of Right to Sue" could be requested.

2. Returned receipt for certified mail signed by Mr. Wesley P. Bernard, indicating that he received certified letter No. 579182 from James R. Anderson, Equal Opportunity Specialist (E) on February 26, 1975.

HERBERT C. McCLEES
Herbert C. McClees
District Director
Equal Employment Opportunity Commission
Houston District Office

Sworn to and subscribed before
me this 2nd day of August, 1976.

BETTY L. DEFFERARI
Notary Public in and for
Harris County, Texas

My Commission Expires June 1, 1977.

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
Houston District Office
2320 La Branch, Room 1101
Houston, Texas 77004
February 25, 1975

Case Nos. AU7-6-504/504U thru
AU7-6-532/532U,
AU7-6-533,
AU7-6-534/534U thru
AU7-6-546/546U and
AU68-8-71/71U

CERTIFIED NO. 579182
RETURN RECEIPT
REQUESTED

Wesley Bernard
717 Thomas
Port Arthur, Texas 77640

Dear Mr. Bernard:

On February 19, 1975, the Equal Employment Opportunity Commission's Houston District Office received notice from Gulf Oil Company - U.S. and Oil, Chemical and Atomic Workers, International Union Local 4-23, the Respondents in the above captioned matter, that they do not wish to entertain conciliation discussions to resolve those issues set out under the Commission's Decision as issued on August 15, 1968. You are hereby notified that you may request a "Notice of Right to Sue" from this office at any time. If you so request, the notice will be issued, and you will have ninety (90) days from the date of its receipt to file suit in Federal District Court.

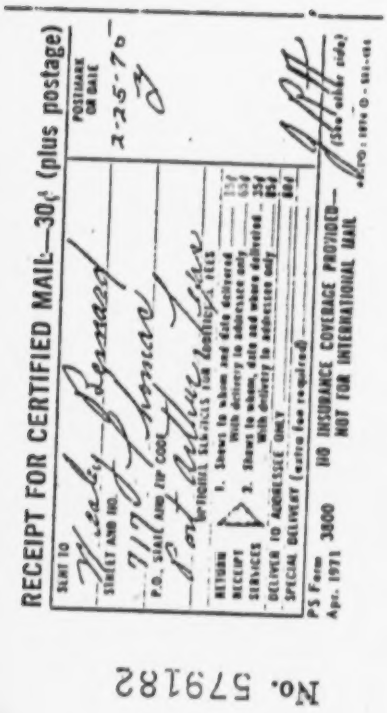
It is advisable that, if you wish to pursue this matter further, you have an attorney ready to proceed with the case prior to issuance of the Notice of Right to Sue. If you do not have an attorney and you wish to proceed in Federal District Court with your case, then call this office for assistance in securing private legal counsel.

If you have any questions, please feel free to call upon me.

Sincerely,

JAMES R. ANDERSON
James R. Anderson
Equal Opportunity Specialist(E)

JRA:slj



RECEIPT FOR CERTIFIED MAIL—30¢ (plus postage)

POSTMARK OR DATE: 2-25-76

SENT TO: Wesley Bernard
STREET AND NO.: 717 W. Spruce
P.O., STATE AND ZIP CODE: Port Arthur, Texas
SPECIAL SERVICES FOR ADDITIONAL FEES

RETURN RECEIPT SERVICES
1. Shows to whom and date delivered — 15¢
With delivery to addressee only — 10¢
2. Shows to whom, date and where delivered — 35¢
With delivery to addressee only — 25¢
DELIVER TO ADDRESSEE ONLY — 85¢
SPECIAL DELIVERY (extra fee required)

PS Form 3800 Apr. 1971 — NO INSURANCE COVERAGE PROVIDED—NOT FOR INTERNATIONAL MAIL (See other side)

No. 579182

PS Form 3811, Nov. 1973 — RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

O SENDER: Complete items 1 and 2. Add your address in the "RETURN TO" space on reverse.

1. The following service is requested (check one).
- ☐ Show to whom and date delivered..... 15¢
- ☐ Show to whom, date, & address of delivery.. 35¢
- ☐ DELIVER ONLY TO ADDRESSEE and show to whom and date delivered..... 65¢
- ☐ DELIVER ONLY TO ADDRESSEE and show to whom, date, and address of delivery ..... 85¢

2. ARTICLE ADDRESSED TO:
Wesley Bernard
717 W. Spruce
Port Arthur, Texas

3. ARTICLE DESCRIPTION:

REGISTERED NO.	CERTIFIED NO.	INSURED NO.
	579182	

(Always obtain signature of addressee or agent)

I have received the article described above.
SIGNATURE: [signature]

4. DATE OF DELIVERY: 2-26-76 — POSTMARK: FEB 26

5. ADDRESS (Complete only if requested)

6. UNABLE TO DELIVER BECAUSE: — CLERK'S INITIALS

* GPO : 1974 O - 537-865

APPENDIX J

Notices of Right to Sue within Ninety Days Addressed to Wesley P. Bernard and Hence Brown, Jr., Dated June 11, 1976

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Houston District Office
2320 La Branch, Room 1101
Houston, Texas 77004

WESLEY P. BERNARD
CHARGE NO. AU7-6-535
DATE FILED: 6-24-67

v.

GULF OIL CORPORATION
PORT ARTHUR, TEXAS

NOTICE OF RIGHT TO SUE WITHIN 90 DAYS

Pursuant to Section 706(f) of Title VII of the Civil Rights Act of 1964, as amended, you are hereby notified that you may, within ninety (90) days of receipt of this communication, institute a civil action in the appropriate Federal District Court. If you are unable to retain a lawyer, the Federal District Court, in its discretion, may appoint a lawyer to represent you and to authorize commencement of the suit without payment of fees, costs, or security. If you decide to institute suit and find you need assistance, you may take this notice, along with any correspondence you have received from the Commission, to

the Clerk of the Federal District Court nearest to the place where the alleged discrimination occurred, and request that a Federal District Judge appoint counsel to represent you.

HERBERT C. McCLEES
Herbert C. McClees, District Director
Equal Employment Opportunity Commission

Date: June 11, 1976

J-3

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
Houston District Office
2320 La Branch, Room 1101
Houston, Texas 77004

HENCE BROWN, JR.
CHARGE NO. AU7-6-540
DATE FILED: 6-24-67

v.

GULF OIL CORPORATION
PORT ARTHUR, TEXAS

NOTICE OF RIGHT TO SUE WITHIN 90 DAYS

Pursuant to Section 706(f) of Title VII of the Civil Rights Act of 1964, as amended, you are hereby notified that you may, within ninety (90) days of receipt of this communication, institute a civil action in the appropriate Federal District Court. If you are unable to retain a lawyer, the Federal District Court, in its discretion, may appoint a lawyer to represent you and to authorize commencement of the suit without payment of fees, costs, or security. If you decide to institute suit and find you need assistance, you may take this notice, along with any correspondence you have received from the Commission, to the Clerk of the Federal District Court nearest to the place where the alleged discrimination occurred, and request that a Federal District Judge appoint counsel to represent you.

HERBERT C. McCLEES
Herbert C. McClees, District Director
Equal Employment Opportunity Commission

Date: June 11, 1976

APPENDIX K

**Affidavit of Nacha I. Martinez,
Dated August 2, 1976,
Accompanied by Letter of James R. Anderson
Addressed to Willie Johnson, Sr.**

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CIVIL ACTION NO. B-76-183-CA

WESLEY P. BERNARD, ET AL
Plaintiffs

V.

GULF OIL COMPANY, ET AL
Defendants

AFFIDAVIT OF NACHA I. MARTINEZ

THE STATE OF TEXAS §
COUNTY OF HARRIS §

Nacha I. Martinez being duly sworn, deposes and says:

(1) I am an employee of the United States Equal Employment Opportunity Commission (hereinafter referred to as "the EEOC") and am located in Houston, Texas, where the Commission maintains its Houston District Office. I have worked for the Commission for eight years and presently hold the position of Equal Employment Technician.

(2) In my position as Equal Employment Technician I am custodian of the records, files and office memoranda located in the EEOC's Houston District Office. Specifically, I have custody of files which would show all documents which have been sent to charging parties by the EEOC's Houston District Office.

(3) Mr. Willie Johnson, Sr. filed a discrimination charge with the EEOC against Gulf Oil Corporation and Local Union No. 4-23, Oil Chemical and Atomic Workers on June 24, 1967. Mr. Johnson never filed a discrimination charge with the EEOC against the Oil, Chemical and Atomic Workers International Union. On February 25, 1975, the EEOC's Houston District Office sent Mr. Willie Johnson, Sr., a letter signed by Mr. James R. Anderson, Equal Opportunity Specialist, a true copy of which is attached hereto as Exhibit A. According to the returned receipt, a true copy of which is attached hereto as Exhibit B, that letter was received by Mr. Johnson on February 26, 1975. A review of our records indicates Mr. Johnson has at no time requested a "Notice of Right to Sue" from this office.

NACHA I. MARTINEZ
Nacha I. Martinez,
Equal Employment Technician
Houston District Office
United States Equal Employment
Opportunity Commission

Subscribed and sworn to before
me this 2nd day of August, 1976.

BETTY L. DEFFERARI
Notary Public in and for
Harris County, Texas.

My Commission Expires June 1, 1977.

K-3

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
Houston District Office
2320 La Branch, Room 1101
Houston, Texas 77004
February 25, 1975

Case Nos. AU7-6-504/504U thru
AU7-6-532/532U,
AU7-6-533,
AU7-6-534/534U thru
AU7-6-546/546U and
AU68-8-71/71U

CERTIFIED NO. 543499
RETURN RECEIPT
REQUESTED

Willie Johnson, Sr.
347 W. 18th
Port Arthur, Texas 77640

Dear Mr. Johnson:

On February 19, 1975, the Equal Employment Opportunity Commission's Houston District Office received notice from Gulf Oil Company - U.S. and Oil, Chemical and Atomic Workers, International Union Local 4-23, the Repsondents in the above captioned matter, that they do not wish to entertain conciliation discussions to resolve those issues set out under the Commission's Decision as issued on August 15, 1968. You are hereby notified that you may request a "Notice of Right to Sue" from this office at any time. If you so request, the notice will be issued, and you will have ninety (90) days from the date of its receipt to file suit in Federal District Court.

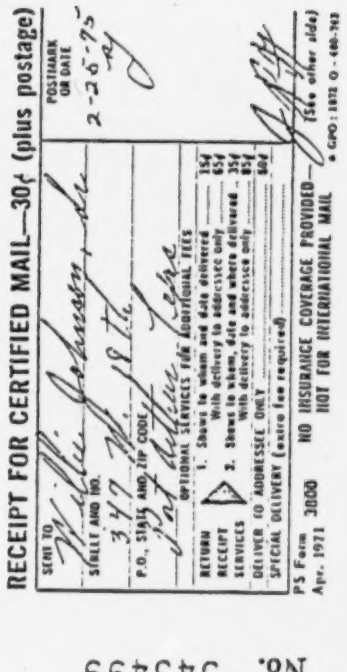
It is advisable that, if you wish to pursue this matter further, you have an attorney ready to proceed with the case prior to issuance of the Notice of Right to Sue. If you do not have an attorney and you wish to proceed in Federal District Court with your case, then call this office for assistance in securing private legal counsel.

If you have any questions, please feel free to call upon me.

Sincerely,

JAMES R. ANDERSON
James R. Anderson
Equal Opportunity Specialist(E)

JRA:slj



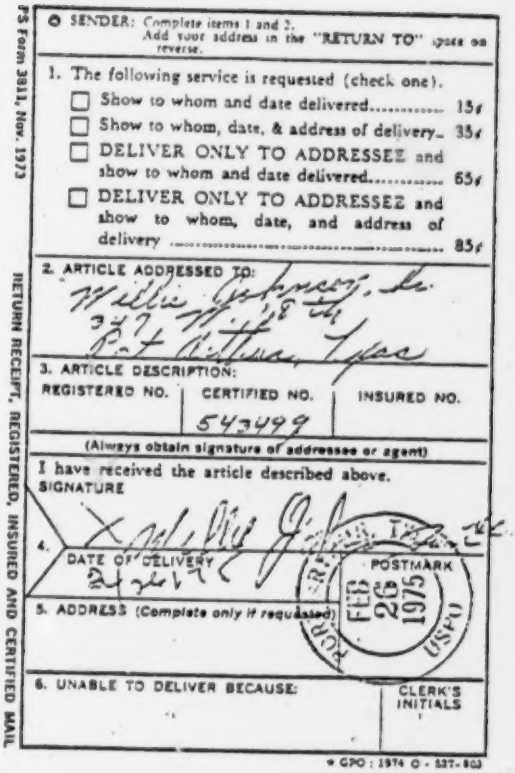
RECEIPT FOR CERTIFIED MAIL—30¢ (plus postage)

SENT TO: Willie Johnson, Jr.
STREET AND NO. 347 W. 18th
P.O., STATE AND ZIP CODE Port Arthur, Texas
POSTMARK OR DATE 2-25-75

OPTIONAL SERVICES FOR ADDITIONAL FEES
RETURN RECEIPT SERVICES
1. Shows to whom and date delivered — 15¢
With delivery to addressee only — 65¢
2. Shows to whom, date and where delivered — 35¢
With delivery to addressee only — 85¢
DELIVER TO ADDRESSEE ONLY — 50¢
SPECIAL DELIVERY (extra fee required) — 50¢

PS Form 3800 Apr. 1971 — NO INSURANCE COVERAGE PROVIDED—NOT FOR INTERNATIONAL MAIL (See other side) — GPO : 1972 O - 480-769

No. 543499



PS Form 3811, Nov. 1973 — RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

SENDER: Complete items 1 and 2. Add your address in the "RETURN TO" space on reverse.

1. The following service is requested (check one).
- ☐ Show to whom and date delivered..... 15¢
- ☐ Show to whom, date, & address of delivery.. 35¢
- ☐ DELIVER ONLY TO ADDRESSEE and show to whom and date delivered..... 65¢
- ☐ DELIVER ONLY TO ADDRESSEE and show to whom, date, and address of delivery ..... 85¢

2. ARTICLE ADDRESSED TO: Willie Johnson, Jr. 347 W. 18th Pt. Arthur, Texas

3. ARTICLE DESCRIPTION:

REGISTERED NO.	CERTIFIED NO.	INSURED NO.
	543499	

(Always obtain signature of addressee or agent)

I have received the article described above.
SIGNATURE X Willie Johnson, Jr.

4. DATE OF DELIVERY 2-26-75 — POSTMARK FEB 26 1975 USPO PORT ARTHUR TEXAS

5. ADDRESS (Complete only if requested)

6. UNABLE TO DELIVER BECAUSE: — CLERK'S INITIALS

* GPO : 1974 O - 537-803

APPENDIX L

Order of the District Court Denying Plaintiff's Motion to Communicate, Dated August 10, 1976

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CIVIL ACTION NO. B-76-183-CA

WESLEY P. BERNARD, ET AL
Plaintiffs

V.

GULF OIL COMPANY, ET AL
Defendants

ORDER

Having considered Plaintiffs' Motion for Permission to Communicate with the Proposed Class:

IT IS ORDERED that the Motion is hereby denied.

JOE J. FISHER
United States District Judge

APPENDIX M

Order of the District Court to Treat Motion to Dismiss as Motion for Summary Judgment, Dated November 29, 1976

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

NO. B-76-183-CA

WESLEY P. BERNARD, et al.

v.

GULF OIL COMPANY, et al.

ORDER

BE IT REMEMBERED that on this day came on for consideration the Court's own motion that the outstanding Motion to Dismiss in this cause be treated under Rule 56, F.R.Civ.P., as suggested by *Georgia Southern & F. Ry. Co. v. Atlantic Coast Line R. Co.*, 373 F.2d 493 (5th Cir. 1967). Since all parties should be allowed a reasonable opportunity to present all material made pertinent to such a motion, the Court believes that January 3, 1977, is a reasonable deadline for the submission of such material. The Motion should be treated as motion for summary judgment. It is accordingly

ORDERED, ADJUDGED and DECREED that the outstanding Motion to Dismiss shall be treated as motion for summary judgment under Rule 56, F.R.Civ.P., and further it is

ORDERED, ADJUDGED and DECREED that the parties submit any and all pertinent materials to said motion by, and no later than, January 3, 1977.

RENDERED this the 29th day of November, 1976.

JOE J. FISHER
United States Chief District Judge

APPENDIX N

**Affidavit of C. B. Draper,
Dated October 12, 1976**

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CIVIL ACTION NO. B-76-183-CA

WESLEY P. BERNARD, ET AL
Plaintiffs

V.

GULF OIL COMPANY, ET AL
Defendants

AFFIDAVIT OF C. B. DRAPER

STATE OF TEXAS
COUNTY OF HARRIS

C. B. Draper, being duly sworn, deposes and says:

1. I am an employee of Gulf Oil Corporation and am located in Port Arthur, Texas, at Gulf's Port Arthur Refinery. I have been an employee of Gulf Oil Corporation for the past 42 years and during that time I have held various positions with the corporation.

2. At the present time I hold the position of Director, Human Resources Administration. I have held this posi-

tion since my appointment on July 1, 1976. The basic function of my job is to direct and coordinate the Human Resources administrative functions of employment, compensation, training, employee development and equal employment opportunity matters and programs for the Port Arthur Refinery. Among my specific responsibilities and duties are:

(a) Determine the needs of the employment program and direct the total employment program for all employees;

(b) Determine the needs and direct the development and administration of training programs for all Refinery personnel;

(c) Determine the needs and direct the employee development program functions and placement functions to assure that employees are developed, identified and placed where they can make their greatest possible contribution to the company;

(d) Plan and direct equal employment opportunity programs and matters related to compliance with laws and directives;

(e) Determine the needs and direct the implementation and maintenance of personnel records and reports;

(f) Determine the needs and direct the development, application and maintenance of the salary administration program; and

(g) Serve as the chairman of the committee appointed by the Refinery Manager to review job applicants.

3. Prior to becoming Area Director, Human Resources Administration, I was Director, Personnel, Wage and Salary Administration, from April 19, 1967 to July 1, 1976. While in this position, it was my responsibility to interpret and maintain wage and salary scales, employment, training and employee activities programs and to develop organization and employee relations policy guides. I was also charged with the maintenance of files of job descriptions, job specifications and related wage and salary information. Under my direct supervision was the maintenance of employment and personnel files and records.

4. I have read and am familiar with the Complaint which has been filed in the United States District Court for the Eastern District of Texas, Beaumont Division, Styled: *Wesley P. Bernard, et al v. Gulf Oil Company,* et al, Civil Action No. B-76-183-CA (hereinafter referred to as "the suit"). The suit was brought by six employees of Gulf Oil Corporation (hereinafter referred to as "Gulf") at its Port Arthur Refinery against Gulf and the Oil, Chemical and Atomic Workers International Union and Local Union No. 4-23. In paragraph 12 of their Amended Complaint, the Plaintiffs allege that the discriminatory acts participated in by Gulf and the Union occurred "prior and subsequent to July 2, 1965".

5. A review of the records under my custody and control reflects that there have been numerous changes in personnel with regard to the management of the Port Arthur Refinery. Since July 2, 1965, there have been four different Refinery Managers; three different Managers of Human Resources; four different Engineering Managers; four different Operations Managers; and three different Service Managers.

6. The records under my custody and control reflect that of the eleven labor supervisors, the individuals who would have supervised the employment of the Plaintiffs, only two are still in that position while six have retired from the employment of Gulf.

7. The records under my custody and control reflect that the individual who was charged with the responsibility of the employment of personnel for the Port Arthur Refinery from 1965 through 1970 is now deceased. Mr. R. T. Morgan, who died on March 18, 1970, was the individual charged with responsibility of employing individuals at the Port Arthur Refinery, including administering pre-employment tests; grading those tests; posting the scores of those tests; and recommending to management whether or not the individual should be hired. In addition, Mr. Morgan was involved with recruiting individuals for employment at the Port Arthur Refinery during the period of 1965 through 1970.

8. Mr. Morgan's knowledge of the employment practices of Gulf including pre-employment testing; grading of pre-employment tests; posting the scores of pre-employment tests; and criteria used in recommending candidates for permanent employment is irreplaceable since the records under my custody and control indicate that through Gulf's regular record retention program all pre-employment tests given to job applicants have been destroyed for the period of 1965 through 1971. There are no other sources for the pre-employment test given to each job applicant other than the knowledge which Mr. R. T. Morgan possessed.

9. The records under my custody and control reflect that Mr. F. F. Timmins, who was a member of the Labor

Relations Department at the Port Arthur Refinery and who was charged with investigating grievances and complaints of individual employees, is now deceased. The records reflect that Mr. Timmins was in charge of employee grievances and complaints from 1965 through 1974. Mr. Timmins was charged with the responsibility of receiving employee grievances and complaints and then speaking with the employee and his supervisor with regard to those complaints. Thus, any complaints or grievances concerning the terms and conditions of employment; employment testing; promotion; or other working conditions was within the knowledge of Mr. F. F. Timmins.

10. The records under my custody and control reflect that all tests given to employees to determine whether or not they were to be promoted during the years 1965 through March, 1971, have been destroyed. Thus, if any employee at Gulf's Port Arthur Refinery took a test for the purposes of determining whether or not he would be promoted during the years 1965 through March, 1971, the tests which that individual took have been destroyed and are not available. There is no other source of information which could duplicate or reconstruct the test taken by the employee seeking the promotion.

11. The documents under my custody and control indicate that effective April 17, 1975, all disciplinary letters that did not result in an employee suspension and which had been placed in an employee's personnel file were removed and destroyed. Thus, if any employee at the Port Arthur Refinery had been reprimanded or disciplined for any infraction of the rules, regulations or other standards governing his behavior and duties as an employee during the years 1965 through 1975 evidence

of such reprimand would have been destroyed in April, 1975. The documents destroyed would have included any written memoranda concerning oral warnings given to an employee.

11. The records under my custody and control reflect that numerous documents relating to the terms and conditions of employment of employees at Gulf's Port Arthur Refinery no longer exist. The company maintains records at its Port Arthur Refinery under a four year retention program. This means that many documents which are four years or older have been destroyed pursuant to Gulf's document retention policy. Under this program the following documents pertaining to the period 1965 through 1971 no longer exist:

(a) Time sheets showing the number of hours which Union employees worked;

(b) Time punch cards showing the number of hours a Union employee worked;

(c) Report of hours worked for each Union employee;

(d) Affidavits signed by Union employees for failure to punch the time clock;

(e) Vacation record cards;

(f) Payroll distribution sheets;

(g) Change of rate and transfer blanks showing permanent or temporary movement in the lines of progression of Union employees;

12. The information which I have stated in this Affidavit is of my own personal knowledge and accurately reflects the information contained in the records under my custody and control at Gulf's Port Arthur Refinery.

/s/ C. B. DRAPER

Subscribed and sworn to before me this 13 day of October, 1976.

/s/ JUDY R. LANE
Notary Public in and for
Harris County, Texas

APPENDIX O

**Affidavit of Herbert C. McClees
Stating EEOC's Position,
Dated June 3, 1976**

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CIVIL ACTION NO. B-76-183-CA

WESLEY P. BERNARD, ET AL,
Plaintiffs

V.

GULF OIL COMPANY, ET AL,
Defendants

AFFIDAVIT OF HERBERT C. McCLEES

STATE OF TEXAS
COUNTY OF HARRIS

Herbert C. McClees, being duly sworn, deposes and says:

1. I am an employee of the United States Equal Employment Opportunity Commission (hereinafter referred to as "the EEOC") and am located in Houston, Texas where the Commission maintains its Houston District Office. I have worked for the Commission for eight years and presently hold the position of District Director.

2. In my position as District Director, I am charged with directing all activities of the Commission for the twenty-six county area surrounding Houston, Texas, including the counties of Jefferson and Orange. Within this geographic area I have the authority, as vested in me by the EEOC, to investigate charges which have been filed against individuals under Title VII of the Civil Rights Act of 1964, as amended. In addition, I have the authority to enter into a Conciliation Agreement settling the charges against the individual when the facts and circumstances of a particular case so dictates. In most cases, after a charge has been filed with the EEOC an employee under my direction and supervision investigates the charge to determine whether or not reasonable cause exists to believe that the act has been violated. If the investigator finds reasonable cause to believe the act has been violated, the EEOC attempts to settle all differences by entering into a Conciliation Agreement which in some cases will provide for an award of back pay to the affected employees and an affirmative action program to ensure continued compliance with Title VII.

3. I have read and am familiar with the Complaint which has been filed in the United States District Court for the Eastern District of Texas, Beaumont Division, styled: *Wesley P. Bernard, et al v. Gulf Oil Company, et al,* Civil Action No. B-76-183-CA (hereinafter referred to as "the suit"). The Complaint was brought by six employees of Gulf Oil Corporation (hereinafter referred to as "Gulf") at its Port Arthur Refinery against Gulf and the Oil, Chemical and Atomic Workers International Union, Local Union No. 4-23. In their complaint these individuals have alleged that Gulf and the Union have

discriminated against them in violation of Title VII of the Civil Rights Act of 1964 and the Civil Rights Act of 1866. Of the six employees who filed this action, three have filed charges with the EEOC, while three have failed to file charges with the EEOC. Of the three employees who have filed charges, two have requested right to sue letters be issued, which requests are presently being processed. The issues raised in the Complaint are almost identical to those issues which were investigated by the EEOC and which were the subject of a Conciliation Agreement signed April 14, 1976 by Gulf, the EEOC and the Office for Equal Opportunity, U. S. Department of Interior (OEO). The Conciliation Agreement specifically provides that the Agreement does not constitute an admission by Gulf of any violation of Title VII of the Civil Rights Act of 1964, as amended.

4. The charges which have been raised in the suit have been the subject of an EEOC investigation which has been conducted over the past eight years. During this time interval, the EEOC, among other things, interviewed employees of Gulf at its Port Arthur Refinery; examined all relevant documents and business records of Gulf; conducted on-site investigations at Gulf's Port Arthur Refinery; and held numerous meetings with Gulf's executives. It is my opinion that this investigation was extremely thorough and comprehensive since it covered all Negro employees employed by Gulf on July 2, 1965, whose seniority date antecedes January 1, 1957 (the defined affected class of Negro employees in the Conciliation Agreement). In order to identify this "affected class" the EEOC conducted a thorough search in order to identify all individuals potentially entitled to back pay under the Con-

ciliation Agreement. The personnel records of all affected employees retained by Gulf since the effective date of Title VII of the Civil Rights Act of 1964 were exhaustively analyzed by the EEOC and no persons potentially entitled to a back pay award could be found other than those listed on Attachments "A" and "B" attached to the Conciliation Agreement. In addition to the award of back pay, the Conciliation Agreement provided for an affirmative action program where specific goals and timetables were set mandating that Gulf recruit, hire, and promote minorities. In order to ensure that Gulf complies with the terms of the Conciliation Agreement, including awarding back pay to the affected class and complying with the affirmative action goals and timetables, Gulf must report to the EEOC every six months for a period of five years its progress in conforming to the provisions of the Conciliation Agreement. I have read the prayer for relief in the Plaintiffs' Complaint and it is my opinion that the relief which the EEOC has obtained by way of the Conciliation Agreement provides the same kind of relief which the Plaintiffs seek in their suit.

6. Under the Conciliation Agreement, Gulf was required to notify in writing each member of the affected class that he or she was entitled to an award of back pay and of the conditions of waiver or release required in accepting such an award. The Agreement provided that each member of the affected class shall be furnished a form on which to notify Gulf, within 30 days, whether such member desires to accept or decline the back pay consideration. A failure on the part of any member to respond within the 30 days would be interpreted as an acceptance of back pay under terms of the Agreement.

The EEOC approved the form of letter and release which was sent to each member of the affected class. The Conciliation Agreement provides that upon fulfillment of the obligations thereunder, Gulf would be in full compliance with all provisions of Title VII of the Civil Rights Act of 1964, as amended, at its Port Arthur Refinery.

7. Gulf commenced mailings under terms of the Agreement approximately three weeks prior to the filing of the suit. Up until the time that Gulf was served with a summons in the suit, it had complied faithfully and fully with all terms of the Conciliation Agreement and approximately 431 Negro employees out of a total of 616 Negro employees entitled to a back pay award had signed releases and received their back pay award. However, Gulf notified the EEOC on the date it was served with a summons in the suit that they could no longer continue to fulfill certain provisions of the Conciliation Agreement until the Court allowed further contact with potential or actual class members to the suit.

8. So that the employees may receive their back pay awards it is my opinion that Gulf should now be allowed to proceed with completing the back pay awards and receiving releases under the terms of the Conciliation Agreement since that Agreement is a fair, equitable, thorough and comprehensive solution to the charges that Gulf has

discriminated at its Port Arthur Refinery in violation of Title VII of the Civil Rights Act of 1964.

HERBERT C. McCLEES
Herbert C. McClees
District Director
Houston District Office
United States Equal Employment
Opportunity Commission

Subscribed and sworn to before me
this 3rd day of June, 1976.

BETTY L. DEFFERARI
Notary Public in and for
Harris County, Texas.

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Petition for Writ of Certiorari were mailed by United States mail, postage prepaid, properly addressed to the following attorneys of record for the parties in this case: Mr. Ulysses G. Thibodeaux, Mr. Jack Greenberg, Mr. Barry L. Goldstein, Mr. Patrick O. Patterson, and Mr. Carl A. Parker.

WM. G. DUCK

Dated: September 17, 1980